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CONVEYANCER'S NOTEBOOK

DELAY IN COMPLETION—DEPOSIT OF PURCHASE-MONEY

A correspondent has raised an interesting point in connection with the deposit of the balance of purchase-money when there is delay in completion. The point arises out of the arrangements entered into with the Treasury in 1946 under which banks require a deposit to be for a minimum period of twenty-one (formerly fourteen) days, and also require the like period of notice of withdrawal or charge interest in lieu of notice.

Under most special conditions of sale and under common form conditions a purchaser can often avoid liability to pay interest at 4 per cent. or 5 per cent. if there is a delay in completion not due to his own default and he has his money ready. The *National Conditions* provide that, if the delay in completion arises from any cause other than the purchaser's neglect or default, he can place the balance of his purchase-money "at interest on a deposit account" with a bank and give notice of such deposit, whereupon the vendor is only entitled to such interest as is produced by the deposit. Another form of condition, typified by the *Law Society's Conditions*, is that the purchaser may "deposit the balance of the purchase-money at any bank," no express reference being made to interest, and the vendor is bound to accept "the interest, if any" allowed on the deposit.

The point which has been raised is what a purchaser should do who has the balance of his purchase-money available and therefore wants to avoid paying interest but does not know how long completion is going to be delayed. If he places his money on deposit at interest, is he entitled thereafter to insist that the vendor should give him twenty-one days' notice of completion to enable

the full notice to be given withdrawing the money from deposit? Alternatively, if the vendor, soon after the date fixed for completion, finds himself ready to complete and asks the purchaser to do so immediately, who must bear the amount debited by the bank for interest in lieu of notice?

It is suggested that where the condition in question does not specifically refer to placing the money on deposit "at interest" the purchaser has no right to deposit the money in such a way that it is not immediately available, and therefore in such a case he ought to place it on deposit without interest, that is to say, in effect, on current account. Accordingly, where the *Law Society's Conditions* or similar conditions apply the purchaser should merely put the money on current account unless he has reason to expect that there will be a long delay in completion, in which case it would be courteous to inform the vendor's solicitors of his intention so that, if they desire the money to be placed on deposit at interest, it can be clearly agreed that the vendor is to give twenty-one days' notice or accept responsibility for any charge made by the bank in the event of the withdrawal of the deposit on short notice.

Where, however, the purchaser is bound to deposit the money *at interest*, he can only do this on the terms agreed between the bank and the Treasury, and it is suggested that in this case the vendor must give a full twenty-one days' notice to complete. If he wants completion on shorter notice than this then he must pay the bank's charges. Accordingly, in this type of case it would appear that a fair procedure would be for the purchaser to inform the vendor's solicitors of his intentions if he anticipates only a few days' delay in completion, and in such a case no doubt the vendor's solicitors would be willing to waive interest.

If there is a delay in completion exceeding three weeks, then it would seem that whichever form of condition applies a vendor could insist on immediate completion, because in such a case there would be some interest allowed on the deposit even after deducting three weeks' interest in lieu of notice.

It is a little surprising that when the new *National Conditions* were published last year no provision was made to cover this point, as the arrangement with the Treasury had then been in force for many years. The problem has never arisen in the case of the *Law Society's Conditions* because these have never provided that the deposit must be at interest. The point of all these provisions is to provide evidence that the purchaser really has his purchase-money available and not so much to provide interest for the vendor, as will be appreciated when it is borne in mind that before the war bank deposit interest was only $\frac{1}{2}$ per cent.

Assent by Administrator to Himself as Next-of-kin of his Wife

A correspondent has raised three points on the form of assent published in our last issue at p. 664 : (1) that the statement that the personal representatives have made no previous assent or conveyance is useless; (2) that in the operative part the grantee is not mentioned by name, but only as "me"; and (3) that the recital that the intestate (a female) was entitled "for her own use and benefit" is not required in these days of emancipation.

As to (1), opinions differ as to the advantage of such a recital. It is, however, used in the forms in the 15th ed. of Key and Elphinstone's *Precedents*, pp. 244 *et seq.* It is true that such a statement does not operate to give the grantee the legal estate under section 36 (6) of the Administration of Estates Act, 1925, as against a beneficiary under a previous assent; but in favour of a purchaser, including it seems a purchaser from the grantee under the assent, it is sufficient evidence that no previous assent has been made, unless notice of it has been endorsed on the grant. The statement will not give the beneficiary the legal estate as against a previous beneficiary to whom an assent has been made, but it may improve the position of a purchaser from the grantee as a purchaser for value without notice. Further, it may be advantageous to obtain a specific statement from the personal representatives, though they would not apparently be guilty of a misdemeanour under section 36 (6) by giving a false statement in an assent, and their covenants for title would cover a previous assent. It does not seem quite accurate, therefore, to say that the statement is quite useless; and, as suggested in Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed., Vol. 2, p. 1473, a purchaser from the grantee may, if it is not included, ask that a statement be procured from the personal representative.

As to (2), under section 36 (4) an assent not in favour of a named person does not pass the legal estate, but it is submitted that an expression which clearly refers to the person making the assent, or an expression which has been defined as meaning the personal representatives by name, must be sufficient. As to (3), the words "for her own use and benefit" do not refer to her separate property, but to the fact that she was not entitled as trustee for others.

[We regret, however, to notice a clerical error in the last paragraph of the form : the word "provision" should read "previous."]

RIGHTS OF ENTRY (GAS AND ELECTRICITY BOARDS) ACT, 1954

The Englishman's home is about as secure against entry by the bureaucrat's minions as is a mediaeval castle against a modern invader, but, nevertheless, it is pleasant to find the legislature restricting somebody's powers of entry. It was held in *Grove* v. *Eastern Gas Board* [1952] 1 K.B. 77, that the statutory power of entry to inspect meters, etc., conferred by the Gas Act, 1948, included the right to enter forcibly. The Rights of Entry (Gas and Electricity Boards) Act, 1954, restricts rights of entry exercisable for the purposes of a Gas or Electricity Board and, except in cases of emergency, either the consent of the occupier of the premises must be obtained or a warrant granted by a justice of the peace.

HILL FARMING ACT, 1954

This Act brings improvement grants made under the Hill Farming Act, 1946, so far as they affect cottages, into line with improvement grants made under the Housing Act, 1949. Originally the latter Act only applied to houses to be occupied by the owner or his tenant; the Housing Act, 1952, extended the scope of the Act to cover a service occupant, provided he was given the right to possession for four weeks after the determination of his contract of service by his employer or by death. Improvement grants under the Hill Farming Act, 1946, are by the new Act extended to service cottages in like manner. The conditions of the grant applied to a cottage are registrable as a local land charge : section 2, Hill Farming (Registration of Conditions) Rules, 1954 (S.I. 1954, No. 601).

Under the 1946 Act where the conditions of an improvement grant are broken, the amount of the grant can be recovered with interest. The new Act amends this provision in two respects: first, if the breach is remediable and in fact remedied within the time allowed by the Minister or is not due to the act, default or connivance of the owner, the amount of the grant does not have to be repaid; secondly, even when it is repayable the amount is limited to the extent of the unexpired period of the conditions.

INHERITANCE (FAMILY PROVISION) ACT, 1938— APPLICANTS WITH ADVERSE INTERESTS

PRACTICE NOTE

The following practice note is published by direction of Vaisey J.

" Where two or more persons are joined as plaintiffs in an application under the above-mentioned Act it will generally be the case

that their respective interests are, or may be, in conflict, and difficulties will then arise as to the presentation of their claims, since two or more plaintiffs cannot be separately represented by counsel at the hearing.

"The Act requires that the application shall be 'by or on behalf of' the dependant and it is therefore not possible for one claimant to initiate the proceedings, making the other claimant a defendant.

"In a recent case, in which a widow and her infant daughter were joint plaintiffs and this difficulty arose, an order was made (upon summons by the plaintiffs in the proceedings) in the following form:—

> AND IT APPEARING that the interests of the Infant Plaintiff are or may be adverse to those of the Plaintiff . . . and that it is desirable that the Infant Plaintiff should be enabled to be separately represented for the purpose of prosecuting her claim in this action under the above mentioned Act
>
> IT IS ORDERED that the Infant Plaintiff . . . be struck out as a Plaintiff and added as a Defendant

"The recital was inserted to make it plain that the infant, having complied with section 1 (1) of the Act by originally joining in the application as a plaintiff, remains a claimant although transferred to the other side of the Record.

"*May* 3, 1954."

Grants under Judicature Act, s. 162; Leave to swear Death

Practice Direction (Probate Grants)

The following practice direction was issued on May 4:—

"The President has authorised the registrars of the Principal Probate Registry to make orders for grants under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or for leave to swear death, in estates not exceeding £3,000 gross value" (instead of £2,000 as formerly).

ANNUITIES AND TAXATION

By David R. Stanford, m.a., ll.b., Barrister-at-Law

It frequently happens that a donor covenants to pay periodical sums to an annuitant without fully appreciating the effect that such payments will have on the taxation liability of himself and the annuitant. Misconceptions on this point are particularly common when the covenant is to pay a so-called " tax free " annuity. It is the purpose of this article to set out the consequences from the taxation viewpoint which will follow from the payment of three of the most common types of annuity.

The first two covenants considered, a covenant to pay a sum of money periodically with no mention of the question of taxation, and a covenant which takes into account the standard rate of tax, have a result which is clear and well settled. The third, a covenant which takes into account the effective taxation liability of the annuitant, is exceedingly troublesome, for, despite the numerous cases dealing with such an annuity, the legal position which arises in respect of the taxation liability of the donor and the annuitant is not yet entirely clear and the practice of the Revenue cannot be considered to be finally fixed. This latter covenant, construed in accordance with the rule in *Re Pettit, Le Fevre* v. *Pettit* [1922] 2 Ch. 765, will be explained in detail.

" Tax free " is, of course, a misnomer, for a donor has no power to free an annuitant from his liability to income tax and surtax and it is not possible for a donor to bind himself to pay over to an annuitant £X at regular intervals in such a manner that the £X escapes all liability to tax (*a*). The ideal " tax free " annuity of £X means, primarily, an annuity given in such a manner that, as a result of the payments made, the annuitant has his " spendable income " increased by £X after his liability to tax has been satisfied. In achieving that result it is desirable that the cost to the donor should be the least possible, which means, in turn, that the amount of tax which the Revenue may claim must be kept to the minimum. To achieve the primary object, the fixed sum accruing to the annuitant, it is necessary to evolve a formula

(*a*) It is possible where, for example, the donor is actually a debtor, to covenant to pay the debt by instalments of capital which are not taxable in the annuitant's hands: *Mallaby-Deeley* v. *C. I. R.* (1938) 23 T.C. 153, 163, 166. But in this case the sums, if paid out of income, are subject to tax in the hands of the debtor before payment. There is, in fact, no objection to the division of " net income ": *Brooke* v. *Price* [1917] A.C. 115, 125.

which will take account of the variation from year to year in the rates of taxation and the reliefs allowed and also possible fluctuation in the amount of income from other sources to which the annuitant may from time to time be entitled. Owing to the arbitrary rules laid down for the collection of tax, this relatively simple problem is fraught with dangers, and many an innocent attempt to give an annuitant a fixed increase in his spendable income has been held to be an arrangement to avoid the taxing provisions, and the covenant, in so far as it infringes those provisions, held to be void. The courts, in construing documents (and in particular wills) granting annuities, have, by placing a benevolent construction on the words used whenever possible, allowed the plain intention of the donor to be carried out (*b*). Although this article is mainly concerned with the taxation position once the question of construction is determined, some indication will be given as to the probable construction of various covenants in the light of decided cases.

Annuity of a Gross Sum

The effect of a covenant to pay an annuity of a gross sum of £X is well settled although the result may not be quite what the donor anticipated. Put shortly, the effect is to make the sum of £X *income* in the hands of the annuitant, whatever the nature of that sum was in the hands of the donor, subject to income tax under Case III of Schedule D (Income Tax Act, 1952, ss. 122, 123) and surtax, and also his income for the purpose of claiming any reliefs to which he may be entitled.

Owing to the provisions for the collection of tax, income tax (but not surtax) on the sum of £X is accounted for to the Revenue in two stages. At first tax at the standard rate for the time being in force is collected from the *donor* and secondly, if the annuitant is not liable to tax at the full standard rate, because of the personal and other reliefs to which he is entitled, there is a repayment made to the *annuitant* by the Revenue of the excess tax paid. As between the donor and the annuitant the position is adjusted by the donor deducting and retaining tax at the standard rate on the £X when he makes the payment. The annuitant is therefore never directly assessed in respect of the payment of the £X.

The donor's financial position

The donor is not entitled to deduct the amount covenanted to be paid in arriving at his profits and gains to be assessed and

(*b*) *Cf.* Viscount Maugham in *C. I. R.* v. *Cook* [1946] A.C. 1, at p. 10.

charged with income tax, so that if the payment is made out of his profits and gains he is assessed on a sum which includes the £X. He is not, however, entitled to include the £X in his total income for the purpose of assessing the reliefs to which he is entitled (Income Tax Act, 1952, s. 221). The donor will therefore pay at least as much income tax as he paid before, and often he will in fact pay more.

EXAMPLE I:

Charles, a single man with no dependants, earns £1,800 a year, and has no other income. He would be entitled to the following reliefs in the tax year 1954/5:—

	£	s.	d.
Personal allowance (£120 at 9s.)	54	0	0
Reduced Rate Relief (£100 at 6s. 6d.)	32	10	0
(£150 at 4s.)	30	0	0
(£150 at 2s.)	15	0	0
Earned income Relief ($\frac{2}{9}$ × £1,800 (£400) at 9s.)	180	0	0
	£311	10	0

The income tax Charles would pay for the year 1954/5 would therefore be £810 (£1,800 at 9s.) less the reliefs of £311 10s., leaving a total of £498 10s. If Charles had covenanted to pay an annuity of £450 out of his income, his earned income relief would have been reduced to the tax on two-ninths of £1,350 (*i.e.*, £1,800 less £450) or £135. In other words, he would pay £45 more tax than if he had not signed the covenant.

The donor is, however, entitled to deduct from the payment he makes to the annuitant tax at the standard rate on the amount of that payment and the annuitant is bound to allow the deduction upon receipt of the residue and to treat the donor as acquitted of liability to him in respect of the amount thus deducted. This deduction the donor will keep if the payment is being made out of his profits and gains brought into charge to tax. If the payment is made out of other funds he must account for the deduction (which he is in that case bound to make) to the Revenue (Income Tax Act, 1952, ss. 169, 170; and see *per* Viscount Simon L.C. in *Allchin* v. *Coulthard* [1943] A.C. 607, at pp. 618, 619).

EXAMPLE II :

Continuing the example given above, Charles would deduct £202 10s. (tax on £450 at 9s.) on paying the annuity, which he would retain, and pay over £247 10s. to the annuitant. In the final result, therefore, by covenanting to pay an annuity of £450 Charles will be £292 10s. out of pocket.

If the donor is a surtax payer, he may deduct the amount covenanted to be paid from his total income for surtax purposes (*Earl Howe* v. *C.I.R.* [1919] 2 K.B. 336, 352; Income Tax Act, 1952, s. 524 and Schedule 24).

The annuitant's financial position

As noted above the annuitant receives the sum covenanted to be paid less tax at the standard rate for the time being in force on the amount of that sum. When the payment reaches his hands it has therefore already suffered income tax, the liability to which arises under Case III of Schedule D (Income Tax Act, 1952, ss. 122, 123). The payment having suffered tax, no assessment is made on the annuitant, but nevertheless the gross amount of the sum covenanted to be paid is part of his total income. He may therefore add this sum to his other income for the purpose of claiming any reliefs from tax to which he may be entitled.

EXAMPLE III :

Anthony, a married man with one infant child, has an earned income of £360 a year, but no other income. He would be entitled to the following reliefs in the year 1954/5 :

	£	s.	d.
Personal allowance (£210 at 9s.)	94	10	0
Child allowance (£85 at 9s.)	38	5	0
Earned income allowance ($\frac{2}{9}$ × £360 (£80) at 9s.)	36	0	0
	£168	15	0

Anthony will therefore pay no tax as his reliefs total more than tax at the standard rate on £360. If, however, Anthony had been in receipt of the £450 annuity given by Charles (see examples I and II above) he would have suffered tax by deduction amounting to £202 10s., being tax at the standard rate on £450. The £450 being part of Anthony's total income he would have been entitled to the following reliefs :—

	£	s.	d.
Personal allowance (£210 at 9s.)	94	10	0
Child allowance (£85 at 9s.)	38	5	0
Earned income allowance (£80 at 9s.)	36	0	0
Reduced Rate relief (£100 at 6s. 6d.)	32	10	0
(£150 at 4s.)	30	0	0
(£150 at 2s.)	15	0	0
	£246	5	0

His liability to income tax in the year 1954/5 would therefore have been £364 10s. (£810 at 9s.) less £246 5s. in respect of reliefs, leaving a total of £118 5s. As he has paid £202 10s. by deduction he will be able to claim a repayment of £84 5s. The net increase in spendable income accruing to Anthony by reason of the annuity from Charles is therefore £331 15s. Taking the total position, Anthony has been given an increase in spendable income of £331 15s. at a cost to Charles from his spendable income of £292 10s. Their joint spendable income is therefore increased at the expense of the Revenue by £39 5s.

If the annuitant is a surtax payer, the sum covenanted to be paid (*i.e.*, the amount actually paid plus the tax at the standard rate deducted by the donor) must be added to his total income for surtax purposes (Income Tax Act, 1952, s. 524).

General effect

It must be noted that the financial position of the annuitant makes no difference whatsoever to the cost to the donor. The actual cost to the donor depends solely upon his own circumstances, the reliefs currently allowed and the fund out of which the annuity is payable. Neither a variation in the standard rate of tax nor in the annuitant's income will affect him.

Similarly the financial position of the donor is immaterial to the annuitant. The amount that he will gain in spendable income is dependent solely upon his personal circumstances and the rates of tax and reliefs in force.

Agreements for Payments Without Deduction of Tax

One difficulty in the way of providing an assured increase in the spendable income of the annuitant is that it is impossible to covenant directly for a "net payment." The Income Tax Act, 1952, s. 506 (2), provides that any "agreement for payment of interest, rent or other annual payment in full without allowing any" deduction of tax authorised by that Act to be made out of

such payment " shall be void." This section does not affect annuities given by will, for the annuitant under a will takes his annuity not by agreement but " from the bounty or forbearance of the testator " (*Festing* v. *Taylor* (1862) 3 B. & S. 217, at p. 235). Orders of the court likewise are free from this restriction, but it may be noted that a covenant carrying into effect an order of the court is nevertheless an agreement (*c*). It would seem that if a donor, *inter vivos*, gave an annuity to an annuitant by a deed to which the annuitant was not a party and there was no oral agreement, section 506 (2) would not apply to that covenant. There is, however, no direct authority on the point (*d*), and it is possible that the mere acceptance of the annuity by the annuitant would constitute the agreement, a distinction being made between the nature of legacies and *inter vivos* gifts.

" Standard Rate Annuities "

Nature of covenant

The simplest method by which a donor can ensure that the annuitant, not being himself a surtax payer, receives a guaranteed minimum increase in spendable income, is to covenant to pay him what is referred to in this article as a " standard rate annuity." This is a covenant to pay a variable gross sum which will be of such amount in each year that, after the donor has deducted tax (under the Income Tax Act, 1952, s. 169 or 170), the amount actually handed over is of constant value. The common form of covenant to do this is a covenant to pay in every year " such a sum as after deduction of income tax at the standard rate for the time being in force will leave a clear sum of " a definite amount. The effect of such a covenant was clearly explained by Sir Wilfrid Greene M.R., as he then was, in *Re Maclennan, Few* v. *Byrne* [1939] 1 Ch. 750, at p. 756 : " Such a covenant is nothing more nor less than a covenant to pay a gross sum; it is only a covenant to pay a gross sum that is permissible in view of Rule 23, sub-rule 2 (*e*). The only difference between such a case and the case of a covenant to pay a named sum is that the gross sum can only be ascertained by taking into account the factor stated; it is really a covenant to pay £X, and the value of X has to be ascertained by taking the net figure which is mentioned in the

(*c*) Orders made by the Divorce Division of the High Court for payments of alimony used to be made " free of tax " (*Dayrell-Steyning* v. *Dayrell-Steyning* [1922] P. 280), but this is no longer the practice.

(*d*) *Cf. Re Goodson's Settlement, Goodson* v. *Goodson* [1943] Ch. 101.

(*e*) The predecessor of the Income Tax Act, 1952, s. 506 (2).

covenant and applying the standard rate of tax at the relevant time and by that method the actual gross sum is ascertained."

In other words the effect of such a covenant is exactly the same as a covenant to give an annuity of a gross sum except that the gross amount varies from year to year. Once the amount covenanted to be paid in any year has been ascertained by grossing-up the amount stated in the covenant, the taxation liability of the donor and the annuitant for that year is worked out by the method set out above in the case of a covenant for an annuity of a gross sum. "Grossing-up" is an expression used for the process by which is discovered the value of that sum which, after tax at the standard rate has been deducted therefrom, will leave a stated amount. It is carried out by multiplying that stated amount by the fraction :—

$$\frac{40}{\text{40 less the standard rate expressed in sixpences}}$$

Example IV :

For the year 1954/5 the standard rate is 9s. in the £

The grossing-up factor is therefore $\frac{40}{40-18} = \frac{20}{11}$

£220 grossed up $= \frac{20}{11} \times$ £220 $=$ £400

The difference between £220 and £220 grossed-up (*i.e.*, £400) is the tax on £400 at 9s. in the £ ; *i.e.*, £180.

For the sake of clarity it is wise to use, even in a will, the common form of words set out above for the payment of a "standard rate annuity," *i.e.*, "such a sum as after deduction of income tax at the standard rate for the time being in force will leave the clear sum of £X." Section 506 (2) being inapplicable to wills, the same result can be achieved by more direct words such as "£X free from tax at the standard rate," but brevity may be bought at too high a price. Whatever expression is used should make it quite clear that the reference to tax is a reference to the standard rate, and not to the annuitant's effective rate.

The danger of using an expression the effect of which has not been established may well be illustrated by contrasting the decisions in two cases on very similar wording. Eve J., in *Re Jones, Jones* v. *Jones* [1933] Ch. 842, had to consider a will directing payment of "such an annuity as after deducting therefrom income tax thereon after the current rate for the time being would amount to the clear yearly sum of £350 free of duty." He held that this was in fact a "standard rate annuity," saying (at p. 846) : "I think in this

connection the current rate means the standard rate, not the rate at which the annuitant will ultimately have to pay, and the bequest is of an annual sum liable to fluctuation in accordance with the movement up or down of the standard rate. It is not an annuity bequeathed free of tax. On the contrary the trustees will by deduction from the sum set aside each year pay on behalf of the annuitant the tax payable in respect thereof, and if the annuitant succeeds in recovering any part of the tax paid it will belong to her just as it would do in the case of an annuity not bequeathed free of tax." Three years later Morton J. in *Re Eves, Midland Bank Executor and Trustee Company Limited* v. *Eves* [1939] Ch. 969, construed a similar provision by a testator for his widow that was expressed as a direction to his trustees to pay to her " during her life the yearly sum of £1,000 to be paid free of all duties and free of income tax at the current rate for the time being deductible at the source such sum to be paid by equal quarterly payments the first of such payments to be made at the expiration of three calendar months from " the death of the testator. He held that this was not a " standard rate annuity," and that " the probable reason for inserting the words ' at the current rate for the time being deductible at the source ' was to make it quite clear that only income tax payable at the current rate deductible at the source was contemplated by the testator and that the testator did not intend his wife to have the annuity free of surtax if and when, by reason of her having other means, surtax should be payable." The annuity was, therefore, one to be construed in accordance with the rule in *Re Pettit, Le Fevre* v. *Pettit* [1922] 2 Ch. 765 (see below).

Any of these directions in a will to pay a sum to the annuitant without deducting tax at the standard rate is benevolently construed to mean that the testator intended tax at the standard rate to be an additional legacy, for, of course, payment cannot be made without a deduction. The payment of the sum stated is not reduced, and the annuity is one for the sum stated, grossed-up at the standard rate. It is, in fact, what the writer has termed a " standard rate annuity."

The donor's financial position

In every year of assessment the donor's liability on his covenant is to pay a sum equal to the stated sum grossed-up. Thus his liability on the covenant varies from year to year.

Example V:

Covenant to pay "such a sum as after deduction of tax at the standard rate for the time being in force shall leave the clear sum of £231."

Year 1952/3

Standard rate = 9s. 6d. in the £

Grossing-up factor = $\frac{40}{40-19} = \frac{40}{21}$

£231 grossed-up = $\frac{40}{21} \times 231 = £440$

Amount payable to the annuitant = £231

Amount deducted on account of tax (*i.e.*, £440 at 9s. 6d.) = £209

Years 1953/4 and 1954/5

Standard rate = 9s. in the £

Grossing-up factor = $\frac{40}{40-18} = \frac{20}{11}$

£231 grossed-up = $\frac{20}{11} \times 231 = £420$

Amount payable to the annuitant = £231

Amount deducted on account of tax (*i.e.*, £420 at 9s.) = £189

Despite the variation in his liability, however, the amount the donor actually hands over to the annuitant remains constant.

The grossed-up amount of the annuity is the amount which the donor must deduct from his total income for the purpose of ascertaining the amount of his reliefs and allowances and for his assessment to surtax. In each year the actual cost to the donor of the annuity, that is, his loss of spendable income, will vary.

The annuitant's financial position

The annuitant will actually receive a payment of the same amount from the donor each year, *i.e.*, the amount stated in the covenant. The amount which he must add to his total income for the purpose of claiming reliefs and allowances and for his assessment to surtax will, however, vary, for the grossed-up amount of the annuity is his income. If there is a repayment by the Revenue on account of his reliefs and allowances, the repayment will be his, and therefore he may eventually receive more than the amount stated in the covenant.

General effect

The financial position of the annuitant again makes no difference to the cost to the donor. However, in this case, unlike the case

of the covenant for an annuity of a gross amount, a variation in the standard rate of income tax will have an effect on the donor's liability. He is also still affected by his own circumstances, the reliefs currently allowable and the fund out of which the annuity is payable.

The annuitant's position is affected only by the same factors as in the case of an annuity for a gross amount.

Uncertainty of Benefit in "Standard Rate Annuities" and Annuities for a Gross Sum

Variation of benefit

In both types of covenant described above the actual benefit or increase in spendable income of the annuitant is doubtful. In the case of the covenant for a gross amount in any one year the maximum possible benefit is the gross sum covenanted, and the minimum possible benefit, if he is not a surtax payer, will be the gross sum less tax at the standard rate. What the benefit between these two extremes will be is beyond the control of the donor, as it is dependent on three extraneous factors : (i) the annuitant's personal circumstances, (ii) the annuitant's other income and (iii) the rates and types of reliefs and allowances which from time to time the legislature is pleased to grant. It is these factors which determine the reliefs and allowances to which the annuitant is entitled. In addition, the minimum possible benefit will vary from year to year according to the standard rate of tax decreed from time to time.

The position is similar in the case of a "standard rate annuity." In any year the maximum and minimum possible benefits (not taking into account surtax liability of the annuitant) are respectively the stated sum grossed-up at the relevant standard rate, and the stated sum itself. What the benefit between these two extremes will be is again beyond the control of the donor, depending on the same factors as in the case of the gross sum annuity. Unlike the latter annuity, however, it is the maximum and not the minimum benefit which may vary from year to year with the standard rate of tax.

Example VI:

> An annuity of "such a sum as after deduction of income tax at the standard rate for the time being in force will leave the clear sum of £231."

Year 1954/5

Grossed-up amount of the annuity $\frac{20}{11} \times$ £231 =	£420
Tax deducted on payment (£420 at 9s.)	£189
Payment to annuitant	£231

Harry is a single man earning £270 a year, but with no other income. His reliefs would be;

	£	s.
Personal allowance (£120 at 9s.)	54	0
Earned income relief ($\frac{2}{9} \times$ £270 (£60) at 9s.)	27	0
Reduced rate relief (£90 at 6s. 6d.)	29	5
Total reliefs	£110	5

The tax payable by Harry would be £121 10s. (£270 at 9s.), less the reliefs £110 5s., leaving £11 5s. Net income of Harry = £258 15s. If Harry were the recipient of the above annuity, his total income would be £690 (*i.e.*, £270 plus £420). His reliefs would be;

	£	s.
Personal allowance (£120 at 9s.)	54	0
Earned income relief (£60 at 9s.)	27	0
Reduced rate relief (£100 at 6s. 6d.)	32	10
(£150 at 4s.)	30	0
(£150 at 2s.)	15	0
Total reliefs	£158	10

His tax liability would be £310 10s. (£690 at 9s.) less the reliefs £158 10s., leaving £152. He has suffered £189 tax by deduction, and will therefore receive a repayment of £37. His net income will therefore be £538 (*i.e.*, £270 plus £231 plus £37).

Harry's total gain from the annuity will be £279 5s., that is to say, £48 5s. more than the stated amount of £231. That gain might have been varied, for example, in the following ways;

(i) If Harry married during the year, his personal allowance would become £210. Without the annuity Harry's net income would have been £270, as his reliefs would have equalled his total liability.

With the annuity Harry's reliefs would have been £199, his repayment of tax £77 10s. and his net income £578 10s.

Harry's total gain from the annuity would have been £308 10s., that is to say, £77 10s. more than the stated amount of £231.

(ii) If Harry having married had then worked diligently and earned another £90 during the year, his earned income relief would have risen to £36. His reliefs would therefore have been £208, his repayment of tax £46 and his net income £637.

Harry's total gain from the annuity would have been £285 15s., that is to say, £54 15s. more than the stated amount.

Avoidance of variation of benefit

In order to avoid this variation of benefit, it is necessary to take into account not only the standard rate of tax but the reliefs and allowances to which the annuitant will be entitled. The " standard rate annuity " is an attempt to give the annuitant a constant sum of money, ensuring that he is not worried by the standard rate of income tax, or by any variation in the standard rate; the attempt fails in so far as the donor has to give more than is necessary. To make sure that the minimum possible benefit for the annuitant is certain, the donor has to give him a sum which (apart from exceptional circumstances) will always provide him with more than the desired increase in spendable income. It is not possible to provide expressly that the excess amount which the annuitant receives should be handed back to the donor, for this would be itself an annual payment and tax would be deducted at source by the annuitant; in view of the provisions of the Income Tax Act, 1952, s. 506 (2), the effect of which is outlined above, it cannot be provided in a document made *inter vivos* that the payment back shall be made to the annuitant without deduction of tax. However, a result very similar to the handing back of the excess by the annuitant can be achieved by the use of covenants which are governed by the rule in *Re Pettit, Le Fevre* v. *Pettit* [1922] 1 Ch. 765.

" Re Pettit Covenants "

This type of covenant is one in which the donor expresses an intention to give the annuitant a fixed increase in spendable income after the annuitant's liability to income tax has been satisfied. In general terms the effect of such a covenant is at first to make

the amount actually paid over to the annuitant, grossed-up at the standard rate in force at the time of such payment, the annuitant's income. The difference between this sum and the amount actually paid over to the annuitant is, of course, the deduction at source by the donor (under either section 169 or 170 of the Income Tax Act, 1952), on account of the tax which is payable on the grossed-up sum. On this income, added to his income from other sources, the annuitant then claims his reliefs and allowances. The proportion of these reliefs and allowances which is attributable to the annuity must then be handed back by the annuitant to the donor. At the present time it is the practice of the Revenue to treat this repayment, in the hands of the donor, as net income and not subject to income tax. The annuitant may deduct the repayment when declaring his total income for surtax purposes (*C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846), but the reliefs which he claimed originally are not affected by the subsequent repayment to the donor (*C. I. R.* v. *Cook* [1946] A.C. 1).

Methods of expressing the covenant

Great care must be exercised in framing the words of any document intended to carry out this intention, for there is always a danger that the covenant may be construed either as a covenant for an annuity of a gross sum or as a covenant for a "standard rate annuity." Where the annuity is given by will, that is the only danger to be taken into account as far as income tax is concerned. If it is desired to give the annuitant in addition to the sum actually handed over a further sum to cover any additional surtax which he may be called upon to pay, the testator must take care to say so in express terms, or to use one of the well-established formulae for producing that result. Provisions in wills, as explained above, are not affected by the Income Tax Act, 1952, s. 506 (2); covenants *inter vivos* are, however, beset by this further obstacle. Thus, whereas quite general expressions in a will are adequate, provided the intention of the testator is made clear, in a deed *inter vivos* any covenant which in terms directs payment without deduction of tax will be void in so far as it thereby infringes that section (*Booth* v. *Booth* [1922] 1 K.B. 66). The effect of such invalidity is generally to turn the covenant into one for an annuity of a gross sum, the gross sum being the amount stated as being the intended benefit to the donee (*Blount* v. *Blount* [1916] 1 K.B. 230). Hence, a covenant made *inter vivos* to pay an annuity of "£X free of tax" would take effect merely as a covenant to pay an annuity of "£X," thus defeating the obvious intention of the donor.

Expressions to be used in a will and their effect

It is important to remember that " income tax " is an expression that includes surtax, which is in essence an additional income tax (*f*) (*Re Reckitt, Reckitt* v. *Reckitt* [1932] 2 Ch. 144, *per* Lord Hanworth M.R., at p. 151). Thus the bequest of an annuity of " £X free of income tax " will cause the testator's estate to pay to the annuitant what amounts to a further annuity of the sum necessary to cover the surtax paid by him as a result of the annuity. This is a dangerous snare for the unwary, for freeing an annuity from surtax may bring the testator's estate to the point of paying astronomic sums. (*Cf. Michelham's Trustees* v. *C. I. R.* (1930) 15 T.C. 737). The writer can give no better advice than by repeating the words of Morton J., as he then was, in *Re Skinner, Melbourne* v. *Skinner* [1942] Ch. 82, at p. 84: " it is to be hoped that, in future, if a testator desires to free an annuitant from the payment of income tax, he will use the words ' free of income tax,' and, if he does not desire the words ' free of income tax ' to include surtax, will add the words ' but not free of surtax '."

Having taken care that the testator's intention in respect of the annuitant's surtax is clear, it is next essential to make it clear whether the testator wishes the annuitant, having received from his estate a stated sum without any deduction therefrom on account of income tax at the standard rate, to account to the testator's estate for any repayment that the annuitant may get from the Revenue because of the reliefs and allowances applicable to the annuity. In other words, is the annuitant to receive a " standard rate annuity " or the stated sum, neither more nor less, after all income tax has been accounted for? The danger of using expressions other than those whose effect is well known was illustrated earlier in this article under the head of " Standard Rate Annuities " at pp. 224, 225, above), and the reader is referred to the facts there set out of the cases of *Re Jones, Jones* v. *Jones* [1933] Ch. 842 and *Re Eves, Midland Bank Executor and Trustee Company, Limited* v. *Eves* [1939] Ch. 969.

The simplest expression that may be used to indicate an intention to make provision for the annuitant, taking into account tax at his effective rate, is " £X free of income tax " (*Re Pettit, Le Fevre* v. *Pettit* [1922] 2 Ch. 765). This will, as stated above, also bind the testator to provide an additional sum to cover the

(*f*) For a case in which, by construction, the words " income tax " were restricted and did not include surtax, see *Re Bates, Selmes* v. *Bates* [1925] Ch. 157; the words used in that case were " such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000."

annuitant's liability to surtax (*Re Crosse, Oldham* v. *Crosse* [1920] 1 Ch. 240; *Wordie's Trustees* v. *Wordie*, 1922 S.C. 28) so that if it is not desired to cover the annuitant's surtax, the words "but not surtax" should be added (*Re Skinner, Melbourne* v. *Skinner* [1942] Ch. 82, *per* Morton J. at p. 84; see p. 231 above). Despite the merit of simplicity which this formula has, there is some argument for using a rather longer formula which will in effect explain more clearly to all parties concerned the effect of the covenant. One has, however, to tread the slippery path between (i) the danger to the annuitant that the annuity will be held not to carry any relief from tax at all and (ii) the danger to the testator that he will be held to have conferred relief at the standard rate.

It is considered that generally the latter danger is avoided by making no mention of the standard rate expressly and not using the words "current rate" or any other measure which could possibly be construed as referring to the standard rate. Thus, for example, where a will provided that an annuitant should receive free of duty, "such a sum in every year as after deduction of income tax for the time being payable in respect thereof will leave a clear sum of £350 to begin from my death and to be payable by equal quarterly instalments in advance," it was held to free the annuitant at his effective rate only (*Re Tatham, National Bank Limited and Matthews* v. *Mackenzie & others* [1945] Ch. 35). Evershed J., as he then was, stated, at p. 43: "As I understand it, the reasoning underlying all these decisions involves the result that, in formulae of the kind here in question, there must be found, if the annuitant is to be held not accountable in respect of reliefs and other repayments, a limitation, by express words or necessary inference, of the phrase 'income tax' to 'income tax at the standard rate'; and that, in the absence of express words *the necessary inference will not be lightly drawn.*"

The former danger, that the words will be construed as granting no relief from tax, may be avoided by the mention of "income tax." It is of course true that the use of those words is not obligatory (*g*) for, as Uthwatt J. said in *Re Hooper, Phillips* v. *Steel* [1944] Ch. 171, at p. 173, when speaking of this problem: "it is not necessary that income tax should in terms be referred to. The purpose sought to be achieved, for instance, a direction to pay the rates incident to devised property, or the use of an artless phrase —I hazard the example of a 'life annuity of £1 a week spending money payable every Saturday'—may well show an intention that the sums are to be net sums after tax has been accounted for.

(*g*) *Cf. Re Cowlishaw, Cowlishaw* v. *Cowlishaw* [1939] Ch. 654.

The only thing necessary is an adequate expression of the testator's intention." Nevertheless, expressions such as " free of all duties " (*Re Saillard, Pratt* v. *Gamble* [1917] 2 Ch. 401), " the clear yearly sum . . . free of all deductions and abatements whatsoever " (*Gleadow* v. *Leatham* (1882) 22 Ch.D. 269) and " a clear annuity " (*Re Loveless, Farrer* v. *Loveless* [1918] 2 Ch. 1), may well convey no relief from tax (*h*). The strength of the advice that the words " income tax " themselves should be used may well be underlined by the judgment of Simonds J., as he then was, in *Re Wells Will Trusts, Public Trustee* v. *Wells* [1940] Ch. 411, when he was considering a gift of annuities " free of duties . . . to be paid free of all deductions by equal quarterly payments." He said, at p. 413: " There is no case among all those which have been cited to me where an annuity had been stated to be free of income tax unless there was clearly expressed on the face of the will an intention of the testator that, when he referred to freedom from deductions, he was including income tax."

Expressions to be used in a deed inter vivos

In a deed it is necessary to keep within the restriction imposed by the Income Tax Act, 1952, s. 506 (2) (see above, p. 222). Therefore no direction can be directly given to pay a stated sum without deduction of tax. In order to achieve the result that the annuitant's effective rate of tax is taken into consideration, the type of phrase which must be used is a covenant to pay an annuity of " such a sum as after deduction of income tax but not surtax will leave a clear sum of " the desired benefit to the annuitant. (*Re Maclennan, Few* v. *Byrne* [1939] Ch. 750). In that case Sir Wilfrid Greene M.R., as he then was, after discussing the " standard rate annuity," continued, at p. 756 : " In such a case where the language used is what I have described (*i*), the directions given for the purpose of ascertaining what that gross sum [*i.e.*, of the annuity] is to be make quite clear what are the factors to be taken into account in arriving at it; and the tax factor which is to be taken into account in such a case is the standard rate of tax and nothing else. But it is clear that a covenantor if he is so minded may go a step further and by appropriate language may provide that the sum of £X [*i.e.*, the gross

(*h*) Compare also *Abadam* v. *Abadam* (1864) 33 Beav. 475; *Wall* v. *Wall* (1847) 15 Sim. 513; *Hunter's Trustees* v. *Mitchell*, 1930 S.C. 978; *Lethbridge* v. *Thurlow* (1851) 15 Beav. 334. In *Re Hooper* itself, no freedom from tax was held to be conveyed by the words " free of all duty . . . and to be paid free of all deductions whatsoever."

(*i*) " Such a sum as after deduction of income tax at the standard rate will leave a clear sum of a stated amount."

annuity] shall be arrived at by taking into account not merely the factor of the standard rate of income tax but that factor adjusted by bringing into account also any recoveries which the payee, as a person entitled to relief, may be able to claim. If language of that character has been used effect must be given to it."

Payment of the annuity

The effect of the provision of an annuity of the *Re Pettit* variety (*e.g.*, a direction in a will to pay annually " £X free of income tax but not surtax ") is that two operations are necessary. This is caused by the nature of the provisions for the collection of tax, although it is not to the taxation effect that reference is at present being made.

At stage one, because income tax at the standard rate must be deducted before payment of the annuity (Income Tax Act, 1952, ss. 169, 170), and yet by construction the sum which must be handed to the annuitant is of the stated amount, *i.e.*, £X, the donor (or his executors) are bound to pay £X grossed-up at the standard rate. Of this sum £X is paid to the annuitant and the balance paid to the Revenue in respect of income tax at the standard rate (if the Income Tax Act, 1952, s. 170, applies) or retained in satisfaction of a like sum already paid (if section 169 applies). The tax paid to the Revenue has, of course, been paid on behalf of the annuitant, and thus, at this juncture, the amount of that tax plus the sum paid to him is his income (*C. I. R.* v. *Cook* [1946] A.C. 1). In consequence the annuitant now claims his reliefs and allowances from income tax on his total income, which includes the sum of £X grossed-up at the standard rate, and it is on that sum that his reliefs and allowances must be calculated and allowed by the Revenue.

Example VII:

Andrew, by his will, leaves an annuity to Robert of " £220 free of income tax but not surtax." Robert has an unearned income, taxed at source (apart from the annuity) of £100.

Year 1954/5

	£	s.
Gross amount of the annuity (£220 grossed-up at 9s.)	400	0
Payment to Robert	220	0
Tax accounted for to Revenue	180	0
Robert's total income (£100 + £400)	500	0

In these circumstances Robert's reliefs and allowances will work out as follows:	£	s.
Personal allowance (£120 at 9s.)	54	0
Reduced rate relief (£100 at 6s. 6d.)	32	10
(£150 at 4s.)	30	0
(£130 at 2s.)	13	0
Total reliefs	£129	10

Tax liability of Robert is £225 (£500 at 9s.) less the reliefs of £129 10s. leaving £95 10s. Tax has been taken by deduction of £180 on the annuity and £45 on the unearned income, so that Robert is entitled to a repayment of £129 10s.

The rule in Re Pettit, Le Fevre v. *Pettit* [1922] 2 Ch. 765.

Stage two in the payment of the annuity now takes place, for by the rule in *Re Pettit* the annuitant is bound to hand back to the donor (or his executors) that proportion of his reliefs and allowances which is referable to the annuity. This is a rule of construction and not of income tax law. By construction he is only to receive the stated amount, *i.e.*, the £X which is given to him free of income tax and surtax. If he retained the repayment on account of the reliefs referable to the £X grossed-up at the standard rate, he would be receiving more than was intended, and that extra would have been paid by the donor, as the repayment is from tax which the donor has met on behalf of the annuitant. In *Re Pettit* itself, Romer J. was considering a will granting an "annuity of £1,000 free of duty and income tax" (this, of course, covered surtax as well). In his judgment he explained the position (at pp. 769, 770) as follows: "The trustees would in each year have had to set aside in respect of her annuity such a sum as, after payment of the tax properly payable thereon, would leave the clear sum of £1,000. Out of this sum the trustees would pay the tax to the Revenue and the £1,000 to the annuitant. . . . It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they would, under the provisions of the Income Tax Acts, be bound, in the first instance to treat that income as liable at the ordinary rate. . . . But this sum might in the end prove too little or too much. If the annuitant were liable to pay super-tax it would be too little and the proper proportion of her super-tax referable to her annuity would, when ascertained, have to be paid to her by the trustees. . . . It might on the other hand turn out that the circumstances of the

annuitant were such that she was not liable in respect of her income to the full rate of income tax, that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the [sum] paid in the first instance to the Revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, *I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have.* If the annuitant were to retain the excess she would in the end have received out of the estate more than 20s. in the £ on the £1,000 given to her by the will."

It was strenuously argued by the Revenue in *C. I. R.* v. *Cook* [1946] A.C. 1 that the effect of the rule in *Re Pettit* being to cause the annuitant to hand back part of any repayment she received to the donor, the annuitant is not entitled to claim the reliefs and allowances in question. The House of Lords, by a majority of three to two (which gives some indication of the difficulties of this question), decided that she was entitled to claim those reliefs, and that " the Inland Revenue have no concern with the question how the sum repaid to the [annuitant] by way of deduction or abatement is applied " (see *per* Viscount Maugham at p. 15).

The annuitant is a trustee of the amount of reliefs repayable to the donor (*cf. C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846), and in fact is also a trustee of his statutory right to recover for the benefit of the donor the tax overpaid in respect of his annuity and is bound at the request of the donor to sign a proper form for that purpose (*Re Kingcome, Hickley* v. *Kingcome* [1936] 1 Ch. 566). Vaisey J. was in favour of extending this duty even further when in *Re Batley, Public Trustee* v. *Hert* [1952] Ch. 280, he considered the position of an annuitant who was married, holding that, if necessary for the purpose of recovering the overpaid tax, she must apply to be assessed separately from the husband (under the Income Tax Act, 1952, s. 355); he also held that any relief or allowances by way of repayment of income tax recovered or recoverable by the annuitant and her husband or either of them in respect of and so far as attributable to the annuity belonged to the donor. This case went on appeal, but there it was decided that, as a question of construction, the terms of the annuity did not come within the *Re Pettit* rule at all.

The proportion of the reliefs repayable to the donor

Before discussing how the reliefs and allowances must be apportioned, it must be noted that there is some confusion in the many

cases on the subject as to whether it is the amount of the reliefs or the amount of the actual repayment that must be apportioned. There can be little doubt that it is the amount of the reliefs, for the references in various judgments to the " repayments " occur in cases where in fact there would be a repayment of the whole amount of the reliefs. The other answer would produce the peculiar result that payment to an annuitant who had no outstanding tax liability would be cheaper than paying one whose tax was already paid (*e.g.*, if the payment were to a person with an unearned income suffering tax at source, the repayment by the Revenue would be all the reliefs; on the other hand if the annuitant had an income of the same amount from his profession, the repayment might not be made but set off against his liability on professional earnings). The apportionment of reliefs is the accepted practice.

EXAMPLE VIII :

Consider the facts of Example VII. Had tax not been deducted at source on Robert's unearned income, his reliefs would have remained at £129 10s., yet the repayment to Andrew's executors would have been only £84 10s.

The proportion of the reliefs which is to be handed back to the trustees is calculated by finding the ratio that the income from the annuity bears to the total income (including the annuity) of the annuitant. It is this portion of the reliefs which is to be paid to the annuitant. The practice of the Revenue is to assess the gross income in each case (and see *Re Williams, Midland Bank Executor and Trustee Company Limited* v. *Williams* [1945] Ch. 320). In *Re Pettit* itself the ratio was expressed as one of net income, after deduction of the tax at the standard rate, but the result is of course the same.

EXAMPLE IX : (Continuing the examples VII and VIII)

Robert has :—

	£	s.
Total gross income	500	0
Total net income (after deduction of tax at 9s.)	275	0
Gross income from annuity	400	0
Net income from annuity (actual payment)	220	0
Total reliefs	129	10

Proportion of reliefs payable to Andrew's executors is

$$\frac{400}{500} \times £129\ 10s. = \frac{220}{275} \times £129\ 10s. = £103\ 12s.$$

Robert before receiving the annuity had a spendable income of £100 (no tax being payable on that figure)

After receiving the annuity he has a spendable income of £300 18s. made up as follows :—

	£	s.
Payment of unearned income net	55	0
Payment of annuity net	220	0
Refund of tax	129	10
	£404	10
Less repayment to executors	103	12
	£300	18

Spendable income gained from annuity £200 18s.

The reader will have noticed from the example above that the net increase in the annuitant's spendable income is less than the sum covenanted. This is because the apportionment method laid down does not truly represent the proportion of the reliefs referable to the annuity. The rule is an artificial one, for, if the annuitant had already a sufficient income to cover all the reliefs available before he received the annuity, there would in fact be no reliefs "referable" to the annuity. Similarly if he had no income before receiving the annuity, all the reliefs would be referable to that receipt; if he subsequently got the income, by the method of apportionment, the amount repayable to the donor would be reduced. To carry out the intention of the covenantor exactly the amount of reliefs referable to the annuity should be worked out by taking the annuity to be the top part of the annuitant's income. However, the rule is well settled.

Example X : (Continuing the last example)

The explanation of Robert's receiving £19 2s. less than the covenanted sum is as follows :—

Reliefs allowed before receipt of annuity	£45 0
Reliefs allowed after receipt of annuity	£129 10

Had the annuity been considered the top part of Robert's income the repayment to the executors would have been the difference between these two figures, *i.e.*, £84 10s. and Robert's increase in spendable income £220.

However, £36, being $\frac{4}{5}$ of the £45 he received in respect of reliefs to which he was already entitled, he must pay to the executors; also £16 18s., being $\frac{1}{5}$ of the new reliefs, *i.e.*, the increase of £84 10s., he can retain. Thus, having kept £16 18s. and paid out £36, he is £19 2s. out of pocket.

The reliefs to be apportioned

There is little authority on the question of what reliefs have to be apportioned. The present practice is to ignore any reliefs which are applicable to particular items of income only, but there seems to be no authority for doing so. Thus, earned income relief (Income Tax Act, 1952, s. 211), is excluded; so also maintenance relief (*ibid.*, s. 101). Reliefs taken into account, for example, are personal relief (*ibid.*, s. 210), small income relief (Finance Act, 1952, s. 15), old age relief (Income Tax Act, 1952, s. 211), child allowance (*ibid.*, s. 212) and dependent relative allowance (*ibid.*, s. 216). In *Re Lyons, Barclays Bank* v. *Lyons* [1952] 1 Ch. 129, the Court of Appeal held that relief in respect of a business loss under what is now section 341 of the Income Tax Act, 1952, should be apportioned; it is possible that a difference may be made by the fact that section 341 was amended by the Finance Act, 1953, s. 15, the amendment putting on a statutory basis the official practice of granting relief to special classes of income. An annuitant who is non-resident and not chargeable to income tax must bring into account all the tax refunded to him (*Re Jubb, Nielson* v. *King* (1941) 20 A.T.C. 297). Post-war credits are apportionable as they are reliefs attributable generally to the whole of the income of the recipient.

The cases would seem to support the view that the rule set out above is only a rough rule and must be used with care. In each case it must be considered whether or not the reliefs obtained could not have been obtained but for the payment of the annuity. If this is so, as in *Re Lyons, Barclays Bank* v. *Lyons* [1952] 1 Ch. 129, then the fact that some other source of income or loss is necessary as well does not stop the reliefs being apportionable.

The effect and nature of the repayment on the taxation liability of the donor and the annuitant

The effect and nature of the repayment is undoubtedly the most difficult problem of all. The difficulty is well illustrated by the dissenting judgment of Lord Simonds in *C. I. R.* v. *Cook* [1946] A.C. 1, where he says, at p. 30 : "It is, I think, material to ask, what is the character of this [sum] of repaid tax when it has reached the hands of the trustees. In the hands of the annuitant it is a sum which has been repaid to her upon the footing that it was a tax paid by her by deduction or otherwise. In the hands of the trustees, how is it to be regarded? As part of the trust income, presumably. But I do not know whether it is income upon which tax has been paid or is income which is still liable to

tax under some case of some schedule. It is not conclusive that such an apparently insoluble problem arises, but my doubts about the correctness of the decision under appeal are strengthened."

The difference between the "standard rate annuity" and a *Re Pettit* annuity in their effect upon the taxation liability of the donor and the annuitant depends solely upon the treatment of this refund to the donor. There is practically no authority to be found in decisions of the High Court as to the nature of this repayment and the practice of the Revenue must be regarded as a "fair guess."

To begin with it is as well to set out the one aspect of this problem which has been the subject of a judicial decision. In *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846, the court was asked to decide whether or not the annuitant could deduct from her "total income" for the purpose of assessment to surtax the sum repaid to the donor's trustees. The Special Commissioners had held that the *actual repayment grossed-up at the relevant standard rate* should be deducted from her total income for this purpose. On appeal to the High Court it was agreed that only the *actual repayment* was to be considered (without prejudice to the question of the amount actually to be deducted). Croom-Johnson J. decided that the repayment should be deducted from her total income, saying, at p. 850: "Here is a sum of money . . . which this annuitant has succeeded in getting back from the Revenue. That sum was handed over by her to the trustees of the estate. I think, on the authorities she was bound to hand it over. Accordingly, it was not money to which she was beneficially entitled. It was money which she received as a bare trustee for the trustees. She had no other duty to perform, once she had it, other than the duty to hand it over to them. In those circumstances, I do not think it is correct to say that it was her income at all." The judge specifically confined his remarks to the net sum and not to the repayment to the donor grossed-up (except possibly at the end of his judgment when he said the Special Commissioners had come to a right conclusion) and counsel for the Crown was at pains to make clear after the judgment had been given that only the actual repayment was affected by this judgment (*k*). It is, therefore, surprising to find that the case is taken as authority for deducting the actual repayment grossed-up at the standard rate for the

(*k*) Report in (1949) 28 A.T.C. 333. After delivering his judgment, in reply to a question by counsel, Croom-Johnson J. said (at p. 338): "As you do not want me to do anything more than express a view about the [actual repayment] anything I have said is not intended to decide any question as to what the ultimate figure, if any, is right to be put into the accounts. That will leave you free to make your contention, later on, if you wish to do so, that the [actual repayment] must be grossed-up."

purposes of the annuitant's surtax assessment (see, *e.g.*, Supplement to Harrison's *Index to Tax Cases*, 16th ed.).

This, then, is the meagre amount of direct authority available. The practice of the Revenue is believed to be as follows: the annuitant is allowed to claim and be paid reliefs on the basis that the actual payment to him by the donor grossed-up at the standard rate is his income (an indisputable practice since *C. I. R.* v. *Cook* [1946] A.C. 1). On repaying the necessary sum to the donor in full, he is allowed to deduct that sum grossed-up at the standard rate from his surtax assessment, apparently on the authority of *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846. In the hands of the donor the repayment is regarded as a net sum and not subject to further income tax, but the full amount of repayment grossed-up is *sometimes* added to the donor's total income for the purpose of calculating his reliefs and surtax and *sometimes* ignored. Like so much of Revenue practice this usually favours the taxpayer, but not always. If the annuitant is not liable to income tax at all, so that the reliefs amount to all the tax (see, *e.g.*, *Re Jubb*, *Neilson* v. *King* (1941) 20 A.T.C. 297), were the repayments grossed-up at the standard rate added back to the donor's income for surtax purposes, he being a surtax payer at the highest rate, the annuity would cost him more than 20s. in the £.

What then is the correct solution? It is first submitted that there is no justification either on the cases or under the provisions of the Income Tax Acts for considering the repayment to the donor grossed-up at the standard rate either as a deduction from or as an addition to the annuitant's or donor's total income for any purpose whatsoever (*l*). Secondly, if the repayment to the donor is liable to income tax such liability must arise under either Case III or Case VI of Schedule D. But is it in fact a profit or gain within Schedule D at all? And if it is, has it not already borne tax in the donor's hands? Certain *obiter dicta* and the decision in *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846, outlined above, lend support to the contention that this is a repayment to the donor of a mistaken overpayment by him to the annuitant, and that, since he has already paid tax on all his income, including the overpayment to the annuitant, the repayment cannot suffer tax again. This reasoning must be regarded as fallacious for the effect would be to cause a readjustment of the reliefs which is contrary to the decision in *C. I. R.* v. *Cook* [1946] A.C. 1.

(*l*) *Cf. C. I. R.* v. *Morant Settlement Trustees* (1948) 30 T.C. 147.

Suggested tax effect of the repayment to the donor

It is submitted, with respect, that the decision in *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846, was incorrect and not supported by the reasoning which, in essence, was unobjectionable. The annuitant may claim his reliefs and allowances by reference to the grossed-up amount of the actual payment to him (*cf. C. I. R.* v. *Cook* [1946] A.C. 1), and the Revenue must refund the full amount so calculated to the annuitant. When this refund is made by the Revenue, which will in general be at some time during the following year, the refund is *not received as income*. It is a return by the Revenue to the annuitant of certain assets (to use a neutral word) which had been taken by them in discharge of a supposed liability to tax on his income. The payment by the annuitant to the donor of this sum, or a part thereof, does not therefore affect the amount of reliefs claimable by the annuitant in the year of the receipt of the refund of the reliefs or in the year in respect of which that refund is due (Income Tax Act, 1952, s. 221; *C. I. R.* v. *Cook* [1946] A.C. 1). When the annuitant's liability to surtax is assessed, his total income is the actual payment to him plus the actual tax thereon which has been paid on his behalf. The grossed-up amount of the actual payment to him cannot be *added* to his total income (*m*), for he never received the part paid to the Revenue and, in so far as it has been returned, it discharged no liability of his.

In the hands of the donor the sum repaid to him by the annuitant is likewise not income, although it may sometimes be derived from his income in the previous year (*n*). It is submitted that the reasoning in *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846 was correct and that the annuitant holds the sum (or part of the sum) repaid to him by the Revenue as a bare trustee for the donor. The character of this sum may have been changed when it was alienated by the donor, for, having been income or capital in the hands of the donor (depending on the fund out of which it was paid), it was not income when repaid to the annuitant. No one suggests that any sum repaid by the Revenue by way of reliefs should be *added* to the income of the recipient in the year of its receipt! The handing over of the sum by the annuitant, who does not own it, to the donor, who does, cannot change its character. It may be regarded as analogous to the payment of a debt due (*cf. Mallaby-*

(*m*) *Cf.* Lord Porter in *C. I. R.* v. *Cook* [1946] A.C. 1, at p. 25.

(*n*) The repayment to the donor will always be made in the year following the year of payment of the instalment of the annuity in question. This is because, in general, no refund of reliefs will be made to the annuitant by the Revenue until the subsequent year and, even if the Revenue makes a repayment in the first year, the amount to be returned to the donor cannot be calculated until the first year has ended.

Deely v. *C. I. R.* (1938) 23 T.C. 153, 163). This sum should therefore not be added to the donor's total income for surtax purposes, nor should tax be deducted by the annuitant when he pays it over to the donor.

EXAMPLE X:

Mark, a single man with £1,800 per annum unearned income.
Year 1954/5

Reliefs :—	£	s.
Personal allowance (£210 at 9s.)	54	0
Reduced Rate Relief	77	10
Total reliefs	£131	10

Tax payable £810 (£1,800 at 9s.) less reliefs = £678 10s.

Net income = £1,121 10s.

If Mark signs a "*Re Pettit*" covenant for £110 in favour of David, a married man with no other income, he will thus pay £90 tax to Revenue and £110 to David which will not affect his reliefs at all. David will reclaim £90, as he is not liable to tax on an income of £200. This he will repay to Mark. Mark's net income will then be £1,101 10s.

If the suggested effect of the covenant is correct, therefore, the cost to Mark of providing David with an income of £110 p. a. will be £20 p. a.

Conclusion

Annuitants will naturally take full advantage of the decision in *C. I. R.* v. *Duncanson* [1949] 2 All E.R. 846, and of the present practice of the Revenue which is even more generous to them. It is submitted, however, that, in the absence of authority donors should resist any attempt on the part of the Revenue to add back the gross payment from the annuitant grossed-up to his total income for surtax purposes, for there is no authority at all nor in the writer's submission any reason for that practice. Further any attempt either to tax or surtax the actual sum repaid should be seriously questioned, although the actual decision in *C. I. R.* v. *Duncanson* would lend some slight support to this practice.

OTHER DANGERS

No attempt has been made in this article to cover the question of freedom from surtax or the immense intricacies of Part XVIII

of the Income Tax Act, 1952. The purely arithmetical changes made by the Income Tax Act, 1952, s. 486, which applies to annuities given free of tax before September 3, 1939, are likewise left out. Briefly, the section causes the calculation to be worked out on the basis that the 1938/9 rates of reliefs and income tax and the 1937/8 rates of surtax are still in force for the purpose of the donor's liability to pay the annuitant's tax. The reader is, however, now reminded that these further mazes confront him.

THE LAW OF STAMP DUTIES

By J. G. Monroe, Barrister-at-Law

(*Continued*)

X The Share and Loan Capital of Corporations

General

The share and loan capital of corporations, companies and governments is the primary and, indeed, almost the sole source of "stock" and "marketable securities." These two terms have been frequently referred to already in connection with stamp duties, for instance, in reference to transfers of stock and marketable securities to which provisions for reduced rates of duty on transfers of small amounts do not apply (*d*), and in connection with transfers in consideration for stock or securities which are treated as transfers on sale (*e*). No definition of either term has so far been attempted.

"Stock" is not as such chargeable with stamp duty. The term is defined (*f*) as including "any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, corporation, company or society in the United Kingdom, or of any foreign or colonial corporation, company or society." It has been said that a long-term debt is a funded debt (*g*), and it is suggested therefore that all shares, stock, and debenture stock of companies under the Companies Acts are included. Moreover, it would seem that debentures are probably included, though if and so far as such debentures are "marketable securities" the point is not material. The term "stock" has been extended to include units under a unit trust scheme (*h*).

"Marketable security" is itself the subject of a charge to

(*d*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 73; Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73.

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 55.

(*f*) *Ibid.*, s. 122 (1).

(*g*) See *Att.-Gen.* v. *South Wales Electrical, etc., Co.* [1919] 2 K.B. 636, *per* Rowlatt J. at p. 642; on appeal [1920] 1 K.B. 552.

(*h*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 54 (1). Ss. 52–56 of this Act comprise provisions for likening units under unit trusts to shares in companies for all purposes of stamp duty. See also Unit Trusts Records Regulations (1946, S.R. & O., No. 1586) made under s. 56 (3).

duty which will be considered in due course (*k*). It is defined (*l*) as "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." This definition has been judicially considered, and it appears clear that a security can be marketable notwithstanding that it is not dealt in on any stock exchange, so long as it could be (*m*), so that, for instance, the debentures of a private company containing no provision objectionable to stock exchanges, such as a restriction on transfer or possibly a prohibition against stock exchange dealings, are marketable securities (*n*); but a security may on the other hand be realisable without being marketable (*o*). An extended definition of "marketable security" for certain limited purposes will be referred to subsequently (*p*).

Share Capital

Stamp duty is charged on the share capital of limited liability companies incorporated in England (*q*), and on capital contributed by a limited partner (*r*). The rate of duty is the same in all cases, but separate statutory provisions providing different methods of enforcement and different methods of collection, are provided for companies incorporated under the Companies Acts (*s*) and for companies incorporated otherwise (*t*). The rate of duty, which was originally 2s. per £100, was increased to 5s. per £100 by the Finance Act, 1899 (*u*), and to £1 per £100 by the Finance Act, 1920 (*a*), but was reduced to its present figure of 10s. per £100 by the Finance Act, 1933 (*b*). A company incorporated under the Companies Acts is required to deliver a statement of original capital and of any increased capital. It is this statement which bears the duty. No penalty is, however, imposed for failure to deliver the statement. It is in practice impossible to obtain a certificate of incorporation until capital duty on the original capital has been paid. Capital duty on any increase can be recovered by action with interest at 5 per cent. per annum (*c*). The duty is exacted on the nominal or authorised, not on the issued, capital.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Marketable Security, see p. 249 and pp. 255–8, *post*.
(*l*) *Ibid.*, s. 122 (1).
(*m*) See *Texas Land and Cattle Co.* v. *I. R. C.* (1888) 16 R. (Ct. of Sess.) 69.
(*n*) *Cf. Deddington Steamship Co.* v. *I. R. C.* [1911] 1 K.B. 1078.
(*o*) *Speyer Bros.* v. *I. R. C.* [1907] 1 K.B. 246, *per* Farwell L.J., at pp. 257–8; on appeal [1908] A.C. 92.
(*p*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 6, p. 257, *post*.
(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 112 and 113.
(*r*) Limited Partnership Act, 1907 (7 Edw. 7, c. 24), s. 11.
(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112, and Revenue Act, 1903 (3 Edw. 7, c. 46), s. 5.
(*t*) *Ibid.*, s. 113.
(*u*) 62 & 63 Vict. c. 9, s. 7.
(*a*) 10 & 11 Geo. 5, c. 18, s. 39.
(*b*) 23 & 24 Geo. 5, c. 19, s. 41.
(*c*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 5.

While it was lawful for a company to authorise its directors to create new capital, the liability for duty did not arise until the directors did create it, *i.e.*, usually just before issue (*d*); this is not now possible (*e*), and duty must be paid on the members' resolution for increase of capital taking effect. The Revenue do not exact capital duty where an increase of capital is expressed to take place upon a reduction or cancellation of capital taking effect, except to the extent that the increased capital exceeds the former figure (*f*).

By section 58 of the Companies Act, 1948 (*g*), a company which has redeemed, or is about to redeem, any redeemable preference shares may issue shares up to the nominal amount of the shares redeemed, or to be redeemed, without any resolution of the company creating such shares, and for purposes of stamp duty this is not deemed to be an increase of capital so long as the redeemable preference shares are redeemed before, or not more than one month after, the issue (*h*) of the new shares. As the redemption of redeemable preference shares is not to be treated as a reduction in the authorised capital of the company (*l*), it is assumed that the shares issued pursuant to the section are to be identified with the redeemed preference shares, but it is not at all certain that this is so.

Capital duty on the capital of companies incorporated otherwise than under the Companies Acts is regulated by a different section of the Stamp Act, 1891 (*m*). The duty is not recoverable by action but a penalty is exigible in case of failure to file the duly stamped statement of capital or increase of capital. It has been held that the duty is payable (among other cases) on the conversion of debenture stock into preference stock (*n*), and on a reorganisation of capital involving the cancellation of existing capital and the substitution of a new (and larger) nominal capital without any increase in the company's assets (*o*).

(*d*) *Att.-Gen.* v. *Tube Investments, Ltd.* (1930) 142 L.T. 561.

(*e*) Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 61 (2).

(*f*) On the interpretation of the decision in *Midland Ry.* v. *Att.-Gen.* [1902] A.C. 171, decided on Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 113, suggested in note (*o*), *infra*, this would appear to be correct.

(*g*) 11 & 12 Geo. 6, c. 38.

(*h*) The word "issue" has had different meanings attached to it for different purposes relating to stamp duty: see *Att.-Gen.* v. *Liverpool Corporation* [1902] 1 K.B. 411 (synonymous with allotment) and *Oswald Tillotson, Ltd.* v. *I. R. C.* [1933] 1 K.B. 134 (synonymous with registration).

(*l*) Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 58 (3).

(*m*) 54 & 55 Vict. c. 39, s. 113.

(*n*) *Att.-Gen.* v. *Milford Docks Co.* (1893) 69 L.T. 453.

(*o*) *Midland Ry.* v. *Att.-Gen.* [1902] A.C. 171. The case is similar in effect to a bonus issue in a company formed under the Companies Acts. It is thought that the decision entails payment of duty only on the difference between the old and the new capital.

Capital duty on the capital contributed by a limited partner is recoverable by action from any of the partners who are jointly and severally liable for it (*p*).

Relief from capital duty may be obtained in connection with schemes of amalgamation and reconstruction (*q*), and for a limited period where an industrial or provident society is turned into a limited company (*r*).

Loan Capital

(a) **Loan capital duty.** The loan capital of commercial companies is normally subjected to stamp duty either under the head "Mortgage, Bond, Debenture, Covenant" or under the head "Marketable Security" (*s*), but the fundamental charge to duty is Loan Capital duty, which is levied under section 8 of the Finance Act, 1899 (*t*), on the loan stocks of local authorities, as well as some company loans which would otherwise escape duty. It is confined to the loan capital of bodies established in the United Kingdom (*u*). This duty at the rate of 5s. per £100 (the original rate of 2s. 6d. per £100 having been doubled (*v*)) was first imposed by the Finance Act, 1899 (*x*), and is levied on a statement of loan capital required to be delivered to the Commissioners before the issue (*y*) of the loan capital in question. The duty is not charged to the extent that it is shown to the satisfaction of the Commissioners that stamp duty in respect of a mortgage or marketable security (*a*) has been paid on any trust deed or other instrument securing the loan capital (*b*). A penalty of a sum equal to 10 per cent. of the duty is payable as a debt to Her Majesty for every month of failure to deliver the statement (*c*). Loan capital is defined as any debenture stock, county stock, corporation stock, municipal stock or funded debt by whatever name known, or any capital raised by any local

(*p*) Limited Partnership Act, 1907 (7 Edw. 7, c. 24), s. 11.
(*q*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55. See p. 266, *post*.
(*r*) Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6, c. 16), s. 10 (8).
(*s*) See these heads in Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.
(*t*) 62 & 63 Vict. c. 9.
(*u*) See Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8. For the purposes of this section the United Kingdom means, in relation to British stamp duty, Great Britain, and in relation to Northern Ireland stamp duty, Northern Ireland. See para. 19 of Part IV of the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80).
(*v*) By Finance Act, 1947 (10 & 11 Geo. 6, c. 38), s. 52.
(*x*) 62 & 63 Vict. c. 9, s. 8.
(*y*) For the meaning of "issue" see *Att.-Gen.* v. *Liverpool Corpn.* [1902] 1 K.B. 411.
(*a*) It is assumed that this is a reference to the entirety of the heads "Mortgage, Bond, Debenture, Covenant" and "Marketable Securities." It is understood that if no duty is payable on the statement the Commissioners do not require it to be furnished.
(*b*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (3). (*c*) *Ibid.*, s. 8 (4).

authority, corporation, company, or body of persons formed in the United Kingdom, which is borrowed or has the character of borrowed money whether it is in the form of stock or any other form, but does not include any county council or municipal corporation bills repayable not later than twelve months from their date, or any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months (*d*). Moreover it does not include any loan capital which is of such a description as to be incapable of being dealt in on a stock exchange in the United Kingdom (*e*). This last qualification is clearly an echo of the definition of a marketable security (*f*). A repayment of 4s. per £100 is granted where the loan capital is issued for the purpose of conversion or consolidation of existing loan capital (*g*). Stock issued in substitution for existing stock is within the charge to the duty (*h*), but the issue of deferred warrants funding arrears of interest principal and interest being payable only "out of the first available funds of the company" has been held not to be the issue of loan capital (*l*). Exemption from the duty is granted in respect of compensation stock issued in connection with nationalisation schemes (*m*).

(b) **Debentures.** In practice most of the loan capital of companies incorporated under the Companies Acts takes the form of debentures or debenture stock and as such is subjected to duty under one or other of the heads "Mortgage, Bond, Debenture, Covenant" (*n*) or under the head "Marketable Security" (*n*). The duty on the latter, where not transferable by delivery, is the same according to the nature of the security as upon a mortgage, *i.e.*, 5s. per £100 of the amount repayable (*o*). The distinction therefore between a registered debenture which is, and a registered debenture which is not, a marketable security does not affect the duty payable

(*d*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (5).

(*e*) Finance Act, 1934 (24 & 25 Geo. 5, c. 32), s. 29.

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 122 (1), p. 246, *ante*.

(*g*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 10. This repayment is not made where the duty has been paid under the head "Mortgage" or "Marketable Security."

(*h*) *Att.-Gen.* v. *Regent's Canal Co.* [1904] 1 K.B. 263; *London and India Docks Co.* v. *Att.-Gen.* [1909] A.C. 7. These cases will now normally qualify for the repayment mentioned in note (*g*).

(*l*) *Att.-Gen.* v. *South Wales Electrical Co.* [1920] 1 K.B. 552. It would seem that the deferred warrants themselves might have been liable as "debentures" or "marketable securities." *Cf. Lemon* v. *Austin Friars Trust, Ltd.* [1926] Ch. 1. If these had been deferred stock it would have been "debenture stock" and so within the definition of "loan capital."

(*m*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 52 (b). Apart from this section the stocks of the nationalisation corporations are liable to the duty: *Studholme* v. *South Western Gas Board* [1954] 1 W.L.R. 313, at p. 320.

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Marketable Securities No. 1 (b). For the rate of duty see p. 28, *ante*.

on it. But it may affect the duty payable on a transfer on sale or by way of voluntary conveyance. A transfer on sale of a debenture which is not a marketable security may possibly be limited to the rate of 1s. per £100 of the nominal amount as on a transfer of a mortgage (*p*), but a transfer of a marketable security on sale will be liable to £2 per £100 on the consideration (*q*). In the case of a transfer of a debenture (even though not a marketable security) operating as a voluntary conveyance, this rate of 1s. per £100 of the nominal amount will not apply, but instead the rate of £2 per £100 of the value will apply (*r*). However, unless such a debenture is to be regarded as stock (*s*), the reduced rates applicable where the value of the property transferred is less than £3,450 and an appropriate certificate of value is given would still apply (*t*). This would not be the case if the debenture (even though not stock) were a marketable security.

Where the issue of debentures is secured by a trust deed, the trust deed is stamped 10s. as a collateral security (*u*). If the debentures are not all issued together with the trust deed the amount of the duty on the debentures must be deposited in order to secure the benefit of the rate appropriate to collateral securities (*a*).

(c) **Debenture stock.** Debenture stock is normally created by a trust deed under which the company incurs an obligation to trustees and the stockholders are merely beneficiaries under the trust. They are in no direct contractual relationship with the company (*b*). The trust deed is thus liable to *ad valorem* duty at the full rate of 5s. per £100 of the amount to be repaid under the head of " Mortgage, Bond, Debenture, Covenant " (*c*), whilst the stockholders receive stock certificates which amount to bare acknowledgments that the persons named therein are the registered holders of the stock mentioned therein. It is suggested (and there is no reported decision to the contrary) that such an instrument, so long at any

(*p*) See *ibid.*, Sched. I: Mortgage, Bond, Debenture, Covenant, No. (4). This heading in the Schedule in terms excepts a marketable security. See also 48 S.J. 599, 600.

(*q*) See above note and Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Conveyance on Sale.

(*r*) Under Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74. See *Anderson* v. *I. R. C.* [1939] 1 K.B. 341.

(*s*) See p. 245, *ante*, where the view is expressed that some debentures (being funded debt) are stock.

(*t*) See Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 73, and Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 33), s. 73. See Vol. 17, p. 500*p*.

(*u*) This is the limit imposed by Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7.

(*a*) It will be in view that this duty is also payable on the reissue of debentures pursuant to Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 90: see s. 90 (4).

(*b*) See *Re Dunderland Iron Ore Company, Ltd.* [1909] 1 Ch. 446.

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: see p. 31, *ante*.

rate as the title to the underlying stock is not by custom transferable by delivery (*d*) of the certificate, is not liable to any stamp duty either as a debenture, marketable security or otherwise. Indeed, it would be very serious if it were, for the practice in England is to issue a fresh certificate to each new holder of the stock, so that duty on the stock would be payable many times over if the certificate were liable to duty. It is thought that the underlying debenture stock is a security (*e*) and that, if there is nothing in the trust deed or elsewhere which would prevent it from being marketable, such stock is a marketable security; but this is not the same as saying that a certificate which is not customarily transferred from one holder to another is a marketable security. The view has, however, been put forward—and it is believed that it is entertained by the Revenue—that if the stock certificate contains the terms of the contract between the company and the holder the certificate is a marketable security (*f*), and it has even been suggested that if there is a statement on the face of the certificate to the effect that the stock is issued on conditions stated on the back of the certificate it is a marketable security, whereas if there is no such statement it is not, even though the conditions still appear on the back. It is suggested that this distinction is forced. However, it is undoubtedly safer, for so long as such views are seriously maintained, to eschew on the face of the certificate any statement referring to the conditions on the back (*g*). It is also prudent to confine the conditions stated on the certificate to a repetition or (if necessary) a paraphrase of conditions contained in the trust deed, and not to include conditions (as is commonly done) which appear only on the stock certificate (*h*). Further, with an issue of unsecured stock it is possible by using a deed poll to dispense with trustees, but as this course means that there is a direct contractual relationship between the company and each stockholder (*k*), it is prudent to avoid this also.

The foregoing observations apply only to a certificate given to the holder of stock where a liability in respect of the stock is

(*d*) As with many American stock certificates. See p. 254, *post*.

(*e*) See *Re Beavan* (1885) 53 L.T. 245 and *cf. Re United Law Clerks Society* [1947] Ch. 150, where this was assumed.

(*f*) This view is founded on the decision in *Brown, Shipley & Co.* v. *I. R. C.* [1895] 2 Q.B. 598, where a promissory note with conditions in it was held to be liable to duty as a marketable security. The view ignores the fact that there is no contract between the company and a debenture stockholder: *Re Dunderland Iron Ore Company, Ltd.* [1909] 1 Ch. 446.

(*g*) There was no such statement on the certificate in *Re Dunderland Iron Ore Company, Ltd.* [1909] 1 Ch. 446, and some importance was attached to this by Swinfen-Eady J. at p. 452.

(*h*) In fact it is the almost universal practice to include a form of stock certificate in a schedule to the trust deed.

(*k*) *Sunderland Marine Ins. Co.* v. *Kearney* (1851) 16 Q.B. 925, at p. 938.

effectively imposed on the company in some other way. Such liability is usually imposed by a trust deed or deed poll (itself, as has been seen, liable to duty) or might possibly, if supported by consideration, be imposed by instrument under hand only or even by an oral contract (*l*). Such an instrument, if effective to impose liability on the company, would be subject to duty as a mortgage or debenture or equitable mortgage (*m*), and if there is no instrument the first stock certificates might be considered to form part of the transaction (*n*). In any case so long as the stock is marketable there will be a liability to loan capital duty if duty is not otherwise leviable. If, however, there is no instrument constituting the stock, or only an instrument which is ineffective to impose any liability on the company, the so-called stock certificates are not acknowledgments of anything and are thus not really stock certificates at all, but they and they alone impose any liability on the company possibly by incorporating the terms of the ineffective instrument. Such certificates are, it is submitted, at all events debentures, and possibly (where marketable) marketable securities. The provisions as to loan capital duty renders the point of importance primarily where the so-called stock is not marketable, when there is no liability to loan capital duty (*o*).

Bearer Instruments

Bearer instruments which enable the title to shares and debentures or, perhaps more correctly, stock and marketable securities to be transferred by delivery naturally bear a special duty of their own to compensate for the loss of conveyance duty on their transfer. The rates as might be expected are thus usually, but not always, higher than the rates of transfer in the same way as a season ticket costs more than the ordinary single fare. The issue of, and dealing in, bearer shares and securities is severely limited by the Exchange Control Act, 1947 (*p*), and their importance is for the present much diminished. Possibly with a view to encouraging the conversion of bearer shares or debentures into registered shares or debentures, provision has been made for repayment of the duty payable on the conveyance on sale of any registered

(*l*) The rule that consideration must move from the promisee and hitherto the provisions of the Statute of Frauds, 1677 (29 Car. 2, c. 3), about contracts not to be performed within a year are obstacles to arrangements of this kind.

(*m*) It would seem that, where the duty of 2s. per £100 is paid on an equitable mortgage, the exemption from also paying loan capital duty contained in Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (3), would not apply in full and a balance of 3s. per £100 would be payable under that head if the loan capital was marketable.

(*n*) See Vol. 17, p. 376.

(*o*) Finance Act, 1934 (24 & 25 Geo. 5, c. 32), s. 29.

(*p*) 10 & 11 Geo. 6, c. 14, ss. 10 and 15.

stock or marketable security which, having been transferable by delivery has, since September 1, 1939, ceased to be so transferable (*q*). It will be convenient to deal with shares and debentures separately.

(a) **Bearer Shares.** Under the heading "Share Warrant issued under the provisions of the Companies Act, 1867 (*r*) [now section 83 of the Companies Act, 1948 (*s*)] and Stock Certificate to bearer" share warrants to bearer and, it is thought, stock warrants to bearer (*t*) are liable to duty at a duty equal to three times the *ad valorem* stamp duty which would be chargeable on a deed transferring the shares or stock specified in the warrant or certificate if the consideration for the transfer were the nominal value of such shares or stock (*u*). The rate is thus approximately £6 per £100 of the nominal value. In cases where the shares or stock exceed in actual value their nominal value the duty may well be less than would be payable on one single sale. The expression "stock certificate to bearer" (*a*) may be wide enough to cover stock warrants to bearer of all British companies, but the charge on share warrants to bearer is by the Stamp Act, 1891 (*b*) expressly limited to the share warrants of companies incorporated under the Companies Acts. Liability to duty has since been extended to the like documents of other companies established in the United Kingdom (*c*). Share warrants and stock certificates to bearer of companies formed or established outside the United Kingdom which are transferred or in any manner negotiated in the United Kingdom have been subjected to duty at a rate originally of 1s. for every £10 (*d*), which has since been three times doubled (*e*), and is now 8s. for every £10 (that is, £4 for every £100) which, as well as ascending by a more gradual scale, is a smaller rate of duty than that applicable to British share warrants. A further duty is imposed on every instrument to bearer, not being a share warrant or stock certificate to bearer, by means of which any share or stock of any company or body of persons formed outside the United Kingdom is assigned, transferred, or in

(*q*) Finance Act, 1944 (7 & 8 Geo. 6, c. 23), s. 44.
(*r*) 30 & 31 Vict. c. 131.
(*s*) 11 & 12 Geo. 6, c. 38.
(*t*) As to the validity of stock warrants to bearer, see *Pilkington* v. *United Rys. of Havana* [1930] 2 Ch. 108.
(*u*) For details of the steps by which the duty rises reference must be made to a table of duties on conveyances on sale.
(*a*) Defined (not exclusively) in Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 108. The definition is extended by Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.
(*b*) 54 & 55 Vict. c. 39.
(*c*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.
(*d*) *Ibid.*, s. 4 (1).
(*e*) By Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76; Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 38; and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.

any manner negotiated in the United Kingdom (*f*). The rate of duty is comparatively insignificant having been originally 3d. (now raised to 6d. (*g*)) for every £25 of the nominal amount of the shares or stock. It is provided that an instrument used for the purpose of assigning, transferring, or in any manner negotiating, the right to any share or stock shall, if delivery thereof is by usage treated as sufficient for the purpose of a sale on the market, be deemed an instrument to which this duty applies (*h*). An example of such an instrument is a share certificate in the American form with form of transfer endorsed which, when completed in blank, is freely dealt with (*l*). Such instruments differ from share warrants in that share warrants are negotiable instruments (*m*), whereas the transferor of a share certificate with form of transfer endorsed, cannot give a better title than he has himself against the registered holder unless the registered holder is estopped from setting up his title (*n*).

A fine of £50 may be incurred by any United Kingdom corporation or company that issues a share warrant (*o*) or stock certificate to bearer (*p*) not duly stamped. There is also a statutory requirement (in respect of which no fine or penalty is prescribed) that a stock certificate to bearer (but not apparently a share warrant to bearer (*q*)) which is subsequently registered shall be cancelled so as to be incapable of reissue (*r*).

The provisions relating to stock certificates to bearer issued by companies incorporated outside or inside the United Kingdom apply to similar certificates relating to units under unit trust schemes constituted by the law of countries inside or outside the United Kingdom as the case may be (*s*). References to the

(*f*) Finance Act, 1899 (52 & 53 Vict. c. 9), s. 4 (2).

(*g*) By Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.

(*h*) Finance Act, 1899 (52 & 53 Vict. c. 9), s. 6. It is thought that the extract from this section in the text (which is based on the rule of construction known as *reddendo singula singulis*) is correct.

(*l*) *Speyer Bros.* v. *I. R. C.* (1902) 66 J.P. 551.

(*m*) *Webb, Hale & Co.* v. *Alexandria Water Co., Ltd.* (1905) 93 L.T. 339.

(*n*) *Colonial Bank* v. *Cady* (1890) 15 App.Cas. 267, at p. 285.

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 107, as extended by Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 109 (2), as extended by Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

(*q*) In the case of the companies incorporated under the Companies Acts these are governed by Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 83 and 112.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 109 (1), as extended by Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

(*s*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 55. This section contains provision for the levying of duty on such bearer instruments issued before this Act as are assigned, transferred or in any way negotiated thereafter with penalties for failure to stamp and ancillary provisions and reliefs.

nominal value of the stock are construed as references to the price at which similar units were first available (*t*).

(b) **Bearer Debentures.** It is thought that the provisions relating to stock certificates to bearer apply to debenture stock certificates or warrants to bearer issued by corporations and companies established in the United Kingdom (*u*), and that the foregoing observations as to share capital in the form of instruments to bearer are material, as the rate of duty of £6 per £100 is higher than the rate applicable to other loan capital in the form of bearer securities. Such other loan capital is charged under the head, "Marketable Security." Where securities are in bearer form there can hardly be any question that they are marketable. The commonest marketable security to bearer is the debenture to bearer, but it is likely that a debenture stock certificate to bearer is also a marketable security, so that a debenture stock certificate to bearer of a foreign company (which is not liable to duty as a stock certificate to bearer) would be liable as a marketable security (*a*).

In dealing with marketable securities to bearer it is necessary for the computation of duty to distinguish three (*b*) classes of security, *viz.*, (i) colonial government securities; (ii) colonial municipal securities; and (iii) other securities. This last category needs further subdivision for other purposes. There is further in some cases a reduced rate applicable to securities given in substitution for a like security duly stamped (*c*) in accordance with the law in force at the time when they became subject to duty. There is no definition of such a security, but it has been held that a security in one company given on a reconstruction in substitution for the security of another is not entitled to the reduced rate (*d*), and a debenture reissued after redemption pursuant to section 90 of the Companies Act, 1948 (*e*), requires to be freshly stamped in full (*f*).

(*t*) Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 54 (2).

(*u*) See the definition in Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 108, and its extension in Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

(*a*) See *Noakes* v. *I. R. C.* (1900) 83 L.T. 714, a decision which may have depended on the special definition of marketable security in Finance Act, 1899 (62 & 63 Vict. c. 9), s. 6.

(*b*) Technically there is a fourth class, securities bearing date or signed before August 6, 1885, which somehow become liable to duty now for the first time (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Marketable Security, No. (1) (c)). The rate would be twice that appropriate to colonial government securities as a result of Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76.

(*c*) This does not include securities stamped at the reduced rate applicable to certain short-dated securities: Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 13 (1) (3).

(*d*) *Mount Lyell Mining & Ry. Co.* v. *I. R. C.* [1905] 1 K.B. 161. The problem is similar to those of the substituted or collateral security under the head "Mortgage, Bond, Debenture, Covenant," see pp. 32–4, *ante*.

(*e*) 11 & 12 Geo. 6, c. 38.

(*f*) *Ibid.*, s. 90 (4). There is protection for persons giving value without notice.

Colonial government securities (whether transferable by delivery or not) were, under the Stamp Act, 1891 (*g*), liable to duty at the same rate as a mortgage, *i.e.*, 2s. 6d. per £100. The rate (in the case of securities transferable by delivery) was doubled by the Finance Act, 1920 (*h*), and again (whether transferable by delivery or not) by the Finance Act, 1947 (*l*), so that the effective rate is now 10s. per £100 where transferable by delivery, and otherwise (like other marketable securities not transferable by delivery) 5s. per £100.

Colonial municipal securities (transferable by delivery) fell within the definition of foreign security under the Stamp Act, 1891 (*m*), and were liable to duty under that Act, or under the Finance Act, 1899 (*n*), in the circumstances hereafter mentioned (*o*) in which foreign securities were liable, at the rate of 1s. for every £10 or, in the case of substituted securities, 6d. for every £20. These rates have been twice doubled (*p*) so that the present rates are 4s. for every £10 and 2s. for every £20, respectively.

All other securities transferable by delivery were originally chargeable either under the Stamp Act, 1891 (*q*), or the Finance Act, 1899 (*a*), to duty at the rate of 1s. for every £10, or, in the case of substituted securities, 6d. for every £20. These rates have been doubled three times (*b*) so that the present rates are respectively 8s. for every £10 (which is £4 per £100 as against £6 per £100 on stock certificates to bearer) and 4s. for every £20.

The securities chargeable at these last mentioned rates include:—

(i) under the Stamp Act, 1891 (*c*), marketable securities transferable by delivery made or issued (*d*) by a body of persons incorporate or unincorporate formed or established in the United Kingdom;

(ii) under the Stamp Act, 1891 (*e*), foreign securities, *i.e.*,

(*g*) 54 & 55 Vict. c. 39, Sched. I: Marketable Security No. (1) (a).
(*h*) 10 & 11 Geo. 5, c. 18, s. 38.
(*l*) 10 & 11 Geo. 6, c. 35, s. 52.
(*m*) 54 & 55 Vict. c. 39, s. 82 (1) (b).
(*n*) 62 & 63 Vict. c. 9, s. 4 (1).
(*o*) See paragraphs (ii) and (iii), *infra*.
(*p*) By Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 38, and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.
(*q*) 54 & 55 Vict. c. 39, Sched. I: Marketable Security No. (3).
(*a*) 62 & 63 Vict. c. 9, s. 4 (1).
(*b*) By Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76; Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 38; and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.
(*c*) 54 & 55 Vict. c. 39, s. 82 (1) (a) and Sched. I: Marketable Security No. (3).
(*d*) For the meaning of these expressions see the cases cited in note (*rr*), *infra*.
(*e*) 54 & 55 Vict. c. 39, s. 82 (1) (b), and Sched. I: Marketable Security No. (3). Colonial municipal securities, which are included in the definition, are omitted in the text above by reason of their having been excluded from the operation of Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76.

for this purpose securities transferable by delivery by or on behalf of any foreign government, municipal body, corporation or company which either is made or issued in the United Kingdom, or is offered for subscription (*f*), and given or delivered to a subscriber in the United Kingdom, or carries interest payable in the United Kingdom;

(iii) under the Finance Act, 1899 (*g*), marketable securities of any foreign State or government, municipal body, or corporation which are transferable by delivery, and are assigned, transferred, or in any manner negotiated (*h*) in the United Kingdom. For the purpose of this Act a marketable security is defined as including any instrument whatever used for the purpose of assigning, transferring, or in any manner negotiating (*h*), the right to any marketable security (*l*) and, whether on the strength of this definition or not, it has been held that a debenture stock certificate to registered holder in the American form, with form of transfer endorsed, is, when completed in blank, a marketable security (*m*) for the purpose of this Act, though it is not a negotiable instrument (*n*) and differs in this respect from a debenture to bearer which is a negotiable instrument (*o*).

The provisions summarised in (ii) and (iii) above apply equally to colonial municipal securities transferable by delivery, save that the rate of duty is one half of that on other securities to which those provisions apply (*oo*).

Relief is given in respect of short dated securities (other than colonial government securities and substituted securities and securities charged under the Finance Act, 1899 (*p*)) so that securities repayable within a year from the date when duty first becomes payable are charged 1s. for every £100 and securities repayable within

(*f*) For the meaning of this expression see the cases cited in note (*rr*), *infra*.

(*g*) 62 & 63 Vict. c. 9, s. 4 (1).

(*h*) For the meaning of this expression see the cases cited in note (*rr*), *infra*.

(*l*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 6. It is thought that in construing this section (to which reference should be made for its full terms) the rule of construction sometimes called "*reddendo singula singulis*" applies and that a document used for transferring the right only to shares or stock is not included in the definition of "marketable security" but only in the definition of "instrument to bearer."

(*m*) *Noakes* v. *I. R. C.* (1900) 83 L.T. 714.

(*n*) This appears to be the proper inference from *Colonial Bank* v. *Cady* (1890) 15 App.Cas. 267, *per* Lord Herschell, at p. 284, a decision on a share certificate in similar form.

(*o*) *Edelstein* v. *Schuler* [1902] 2 K.B. 144.

(*oo*) Colonial municipal securities were among those exempted from the doubling of duty effected by Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76.

(*p*) 62 & 63 Vict. c. 9.

three years from such date are charged 2s. for every £100 (*pp*). If any security stamped at such reduced rate is assigned, transferred, or in any way negotiated (*q*), after the maturity date the duty on it must be made up to the full rate (*qq*). These reduced rates are the same for colonial municipal securities as for any other securities to which they apply. A security substituted for one on which the reduced rate has been paid is not itself entitled to the reduced rate applicable to substituted securities (*r*).

A fine of £20 may be exacted from any person who in the United Kingdom makes, issues, assigns, transfers, negotiates or offers for subscription (*rr*), any foreign security (which by definition includes a colonial municipal security (*s*)) or colonial government security charged with duty under the Stamp Act, 1891 (*ss*), which is not duly stamped. There does not appear to be any such fine in relation to British marketable securities (*t*). A like fine may be exacted from any person who in the United Kingdom assigns, transfers, or in any manner negotiates (*tt*), or is concerned in any manner as broker or agent in assigning, transferring, or in any manner negotiating, any instrument chargeable under section 4 of the Finance Act, 1899 (*u*), which is not duly stamped.

Miscellaneous duties

Two stamp duties in name only are levied on certain corporations. First corporation duty is levied as a substitute for death duties on certain corporations that do not distribute their profits

(*pp*) Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 13 (1), as amended by Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 38, and Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.

(*q*) For the meaning of these expressions see the cases cited in note (*rr*), *infra*.

(*qq*) Finance Act, 1911 (1 & 2 Geo. 5, c. 48), s. 13 (2).

(*r*) *Ibid.*, s. 13 (3).

(*rr*) As to the meaning of these expressions see the following cases:—As to "makes" *Revelstoke* (*Lord*) v. *I. R. C.* [1898] A.C. 565. As to "issues" *ibid.*; *Chicago Railway Terminal Elevator Co.* v. *I. R. C.* (1896) 75 L.T. 157, 572; *Brown* v. *I. R. C.* (1900) 84 L.T. 71; *Canada Permanent Mortgage Corpn.* v. *I. R. C.*, 1932 S.C. 123; *Grenfell* v. *I. R. C.* (1876) 1 Ex.D. 242. As to "offers for subscription" *Chicago Railway Terminal Elevator Co.* v. *I. R. C.*, *supra*, and *Brown* v. *I. R. C.*, *supra*. As to "assigns or transfers" *Chicago Railway Terminal Elevator Co.* v. *I. R. C.*, *supra*: see also *Speyer Bros.* v. *I. R. C.* [1907] 1 K.B. 246, at p. 254; on appeal [1908] A.C. 92.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 82 (1) (b).

(*ss*) 54 & 55 Vict. c. 39. See s. 83. S. 84 authorises the Commissioners to allow such marketable securities to be stamped after execution without penalty. As there is now a general authority to remit penalties under s. 15 (3) (b), as amended by Finance Act, 1895 (58 & 59 Vict. c. 16), s. 15, this provision is unimportant.

(*t*) A penalty may be exigible indirectly through the provisions relating to loan capital duty: Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (4). A fine is imposed on the holder of an unstamped debenture which is not a marketable security. Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15 (2).

(*tt*) See note (*rr*), *supra*.

(*u*) 62 & 63 Vict. c. 9. See s. 4 (3).

among their members, in token of the fact that the corporation does not die and that the value of its assets is not reflected in the estates of its members as they die. The duty is declared to be a stamp duty by the statute imposing it (*a*). But it is a stamp duty in name only as it is not levied by a charge for the affixing of a stamp to an instrument, but in the manner of income tax by the imposition of a personal liability on the corporation in question, and of a charge on its property. For this reason no more is here said of the duty.

The second duty is a true stamp duty in that it is collected by the making of a charge for the affixing of a stamp. But its object is not the collection of revenue but the defraying of the cost of preparation and auditing of the instrument in question, namely, the accounts of local authorities whose accounts are subject to district audit (*b*). Here again, as the rates are fixed from time to time by the Treasury, and are calculated by reference to the cost of the audit, the subject will not be further considered.

Compositions

Any government or corporation that desires to offer securities or shares that can be transferred free of United Kingdom stamp duty may, as an alternative to the issue of instruments transferable by delivery, the issue and transfer of which is now restricted (*c*), compound for the duty on transfers by making a payment or payments to the Revenue which have the effect of exempting transfers of the relevant shares or securities from stamp duty. Composition payments are of two kinds: the first is a once for all payment which has the effect of exempting from stamp duty transfers of the relevant security throughout its period of currency, while the second is a half-yearly payment, made on the terms of an agreement between the government or corporation in question and the Revenue, throughout the currency of the agreement which has the effect of exempting from stamp duty transfers of the shares or securities in question made during the currency of the agreement.

Only foreign, dominion and colonial governments can make a composition of the first type. Section 114 of the Stamp Act, 1891 (*d*) (which provides for once for all composition payments) applied only to a limited class of dominion and colonial securities,

(*a*) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11.
(*b*) Local Government Act, 1933 (23 & 24 Geo. 5, c. 51), s. 221. See also Audit Stamp Duty Order, 1938 (S.R. & O. 1938, No. 793).
(*c*) Exchange Control Act, 1947 (10 & 11 Geo. 6, c. 14), ss. 9, 10 and 15.
(*d*) 54 & 55 Vict. c. 39. See also Sched. II, Part I.

but its provisions have been extended to foreign government securities inscribed in the books of the Bank of England (*e*), and to a wider class of colonial and similar stocks (*f*). The original rate of composition was 1s. 3d. for every £10 of the security in question with an additional 3d. if the redemption date was more than sixty but less than one hundred years on, or an additional 6d. if the redemption date was more than one hundred years on, or there was no fixed redemption date. These rates have been twice doubled (*g*), and as a slight alleviation from the effect of the first doubling a reduction was made to 1s. for every £10, where at the date of the composition the redemption date was not more than twenty years on, and 2s. for every £10 where at such date it was more than twenty, but not more than forty, years on (*h*). These rates were doubled by the second doubling above mentioned and the present rates are thus 2s., 4s., 5s., or 6s., for every £10 according as the redemption date is not more than twenty, forty, sixty, or one hundred years on, and 7s. for every £10 where the redemption date is more than one hundred years on or is not fixed.

Compositions of the second type consist of half-yearly payments made pursuant to an agreement with the Revenue, and may be made by county councils, corporations, or companies (and by the trustees or managers of unit trust schemes (*l*)) in relation to the stock (*m*) or funded debt (*n*) under section 115 of the Stamp Act, 1891 (*o*), or by certain dominion and colonial governments in relation to certain of their stock pursuant to similar agreements under section 37 of the Finance Act, 1939 (*p*). In either case the agreement provides for the delivery of a half-yearly account of the amount of stock or funded debt in question outstanding during the relevant half year (*q*). It is on this that the amount of the composition is calculated. In the case of county councils, corporations, companies, and unit trusts, the amount is recoverable as a

(*e*) By Finance Act, 1894 (57 & 58 Vict. c. 30), s. 39.

(*f*) By Finance Act, 1898 (61 & 62 Vict. c. 46), s. 5, and Finance Act, 1928 (18 & 19 Geo. 5, c. 17), s. 32.

(*g*) By Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 37 (1), and by Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52 (1) (b).

(*h*) Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 46.

(*l*) See Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 54 (5).

(*m*) For the definition of stock, see p. 245, *ante*.

(*n*) "A long term debt is a funded debt": *Att.-Gen.* v. *South Wales Electrical Power Co.* [1919] 2 K.B. 636, *per* Rowlatt J. at p. 642; on appeal [1920] 1 K.B. 552. See p. 245, *ante*.

(*o*) 54 & 55 Vict. c. 39. See also Sched. II, Part II.

(*p*) 2 & 3 Geo. 6, c. 41. See s. 37 (4), which provides that this is in substitution for composition under Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 114.

(*q*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 115 (1) and (2), and Sched. IV, Part II. Finance Act, 1939 (2 & 3 Geo. 6, c. 41), s. 37 (1).

debt due to Her Majesty (*r*), and there is a penalty of 10 per cent. of the duty exigible for every month of default in delivering the account (*s*). The rate of duty in the case of colonial governments was originally fixed by the Finance Act, 1939 (*t*) at 3d. per £100 per half year. This has since been increased to 6d. per £100 (*u*). The rate of duty in the case of county councils, corporations and companies was fixed by the Stamp Act, 1891 (*a*), at 6d. per £100 per half year. This has been twice doubled (*b*), so that the present rate is 2s. per £100. The county council, corporation or company, or the managers or trustees of the unit trust in question may (if they choose), instead of regarding payment of the composition as rendering its securities or shares more attractive, charge a fee not exceeding the amount of duty saved in addition to any other fees chargeable upon registering the transfer, and thus recoup itself the composition (*c*).

XI Exemptions and Reliefs

General

Exemptions and reliefs from stamp duties conferred by the Stamp Act, 1891 (*d*), and subsequent Revenue and Finance Acts are of two types, *viz.*, exemptions from a particular duty, and exemptions from all stamp duties—that is, special and general exemptions. The distinction between special and general exemptions is important. For instance, there is a special exemption from duty of contracts relating to the sale of goods, as on an agreement under hand only (*e*). This does not exempt such a sale from Bond Covenant duty where periodical payments are to be made (*f*). On the other hand there is a general exemption in respect of instruments for the sale or other disposition of any ship (*g*). This exemption saves a contract for the sale of a ship from Bond Covenant duty even if periodical payments are to be

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 115 (4).
(*s*) *Ibid.*, s. 115 (5).
(*t*) 2 & 3 Geo. 6, c. 41, s. 37 (2).
(*u*) By Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52.
(*a*) 54 & 55 Vict. c. 39, s. 115 (3).
(*b*) By Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 37 (2), as amended by Statute Law Revision Act, 1927 (17 & 18 Geo. 5, c. 42), and by Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 52. The effect of the second doubling has been nullified by the allowance of a reduction of 1s. per £100 in the case of local authority stocks issued after the beginning of the year 1953: see Finance Act, 1953 (1 & 2 Eliz. 2, c. 34), s. 31 (2).
(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 115 (6).
(*d*) 54 & 55 Vict. c. 39.
(*e*) *Ibid.*, Sched. I: Agreement or any Memorandum, etc., Exemption (3).
(*f*) *Durham County Electrical Power Distribution Co.* v. *I. R. C.* [1909] 1 K.B. 737, *per* Channell J. at p. 742; on appeal [1909] 2 K.B. 604.
(*g*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: General Exemptions No. (2).

made (*h*). In fact such an exemption frees the instrument from stamp duty under any head whatever so long as the sale or other disposition of the ship is the primary object of the instrument (*k*). There are also other exemptions conferred by statutes not primarily dealing with Revenue at all with a view to encouraging, or not discouraging, transactions under such Acts (*l*). Probably the commonest exemption of this class met with in practice is the exemption of releases of property mortgaged to building societies and other favoured institutions (*m*) from duty as on the release of a mortgage. Exemptions of all the above types have been referred to in connection with the various charges to duty under consideration. It is beyond the scope of these articles to consider any further exemptions conferred by Acts other than Finance and Revenue Acts. Furthermore it is necessary only to recapitulate many of the exemptions conferred by the Stamp Act, 1891 (*n*) itself, and by Finance and Revenue Acts in so far as they have previously been dealt with, and to enlarge only on those exemptions which still require such treatment.

General Exemptions

At the end of the First Schedule to the Stamp Act, 1891 (*n*), is a list of six general exemptions from all stamp duties numbered (1) to (6) inclusive. Of these No. (5) relates exclusively to Ireland, and No. (6) is of so very a special a nature that no more will be said of it. The other four are of more importance.

(1) **Transfers of shares in the Government or Parliamentary stocks or funds.** This exemption saves duty on conveyances on sale, voluntary dispositions, and conveyances in any other case, of most government securities. It does not, however, save them from settlement duty (*o*) nor it is thought from mortgage duty (*p*). This exemption has in effect been extended to a number of stocks the interest whereon is guaranteed by the Treasury (*q*).

(*h*) See *British Italian Corpn.* v. *I. R. C.* [1921] W.N. 220, more fully reported in Sergeant on *Stamp Duties*, 2nd ed., p. 318.

(*k*) For a case where it was not the primary object see *Deddington Steamship Co.* v. *I. R. C.* [1911] 2 K.B. 1001.

(*l*) An exemption from stamp duties under other Acts should be regarded as an exemption imposed by the Stamp Act, 1891 (54 & 55 Vict. c. 39), and amending Finance Acts and Revenue Acts and not from all charges levied by the affixing of a stamp (*e.g.*, court fees): *Re Elsie Inglis Memorial Fund* [1954] 1 W.L.R. 407.

(*m*) See pp. 38–9, *ante*.

(*n*) 54 & 55 Vict. c. 39.

(*o*) See *Ansell* v. *I. R. C.* [1929] 1 K.B. 608.

(*p*) The only common form of mortgage of stock is a memorandum of deposit accompanied by a transfer, as to which see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 23 (2). The memorandum would require a stamp but, in the case of stock within the above Exemption, the transfer would not.

(*q*) Finance Act, 1947 (10 & 11 Geo. 6, c. 35), s. 57, as amended by Air Corporations Act, 1949 (12, 13 & 14 Geo. 6, c. 91), s. 41 and Sched. IV, and see *ibid.*, s. 11.

(2) **Transfers and other dispositions of ships.** The full text of the exemption is "Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel." The comprehensive terms in which transactions relating to ships are exempted is to be contrasted with the narrower terms under Exemption (1). Even so the exemption was not sufficient to save debentures giving a charge on a ship where the primary object was to create a marketable security (*r*), nor to save a charterparty (*s*) at the time before charterparties were themselves exempted from all stamp duties (*t*).

(3) **Instruments of apprenticeship and service contracts in Her Majesty's overseas possessions.** A limited class of service contracts (*u*) and all instruments of apprenticeship where the service or apprenticeship is to take place in Her Majesty's overseas possessions are, under this exemption, exempt from all stamp duties when executed in the United Kingdom. All instruments of apprenticeship are now exempt (*a*).

(4) **Testaments, testamentary instruments and dispositions** *mortis causa* **in Scotland.** This exemption is usually taken for granted. It is none the less interesting to speculate on the stamp duties that might otherwise be exigible on wills.

A series of further exemptions from all stamp duties were conferred by the Finance Act, 1949 (*b*). These are instruments of apprenticeship; articles of clerkship to a solicitor; bonds given pursuant to the directions of any Act or on obtaining letters of administration; and charterparties (*c*).

Special Exemptions

Many of the various heads in the First Schedule to the Stamp Act, 1891 (*d*), contain exemptions from stamp duty under the head in question. Most of those have been alluded to earlier in these articles. Such exemptions are to be found under the following headings:—Agreement, Bill of Exchange (*e*), Letter or Power of

(*r*) *Deddington Steamship Co.* v. *I. R. C.* [1911] 2 K.B. 1001.
(*s*) *Ibid.*, *per* Farwell L.J. at p. 1009.
(*t*) By Finance Act, 1949 (12 & 13 Geo. 6, c. 47), Sched. VIII, Part I, para. 9.
(*u*) It is necessary to refer to the words of the Exemption for fuller details.
(*a*) Finance Act, 1949 (12 & 13 Geo. 6, c. 47), Sched. VIII, Part I, para. 4.
(*b*) 12 & 13 Geo. 6, c. 47.
(*c*) *Ibid.*, Sched. VIII, Part I, paras. 4, 5, 8 and 9.
(*d*) 54 & 55 Vict. c. 39.
(*e*) Exemptions extended by Finance Act, 1894 (57 & 58 Vict. c. 30), s. 40; by Finance Act, 1921 (11 & 12 Geo. 5, c. 32), Sched. III, para. 5, and by Air Force (Application of Enactments) Order, 1929 (S.R. & O. 1929, No. 78).

Attorney (*f*), Policy of Sea Insurance (*g*), Receipt (*h*), Settlement and Warrant for Goods (*l*).

Other special exemptions have been conferred by later Finance Acts in relation to duties imposed by such Acts as in the case of loan capital duty (*m*) and voluntary disposition duty (*n*). Furthermore, in a few cases, exemptions have been granted from already existing duties. The most important of these exemptions are those conferred by the Finance Act, 1949 (*o*) from duty under the head Agreement. Instruments so exempted are Letter of Allotment, Letter of Renunciation, Scrip Certificate, and Scrip or other document (all of which are also exempt under the heading "Deed"); Agreements for the issue, allotment, or sale of any stock or marketable security, and Warrant for goods (*p*).

There are, of course, other exemptions, and two of them are so complex that they have only been referred to previously as exemptions from the duties affected, and no detail has been given of the conditions upon which such exemptions are granted. The exemptions both relate to conveyance on sale duty; one of them possibly also relates to voluntary disposition duty and the other also relates to capital duty.

(1) **Transfers between associated companies.** It is provided (*q*) that stamp duty under the heading "Conveyance or transfer on sale" is not to be charged on any instrument, the effect of which, is shown to the satisfaction of the Commissioners to be to convey or transfer a beneficial interest in property from one company with limited liability to another such company, where either one company is the beneficial owner of not less than 90 per cent. (*r*) of the issued share capital of the other, or a third company is beneficial owner of not less than 90 per cent. (*r*) of the issued share capital of each of them. It is further necessary in order to qualify for the exemption to satisfy the Commissioners that the instrument in question

(*f*) Exemptions added to by Finance Act, 1917 (7 & 8 Geo. 5, c. 31), s. 30, and Finance Act, 1921 (11 & 12 Geo. 5, c. 32), Sched. III, para. 4.

(*g*) The only exemption is that inserted in this Act by Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 35 (3).

(*h*) Exemption amended by Finance Act, 1924 (14 & 15 Geo. 5, c. 21), s. 36.

(*l*) The duty on warrants for goods was abolished by Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 35 (2), and Sched. VIII, Part I, para. 27.

(*m*) See Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (3).

(*n*) See Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (1), proviso., amended by Finance Act, 1942 (5 & 6 Geo. 6, c. 21), s. 44.

(*o*) 12 & 13 Geo. 6, c. 47.

(*p*) *Ibid.*, Sched. VIII, Part I, paras. 17 and 27.

(*q*) Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 42.

(*r*) It was assumed in *Lever Bros., Ltd.* v. *I. R. C.* [1938] 2 K.B. 518 (decided on Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55) that 90 per cent. of the share capital is to be measured by nominal amounts even where there is more than one class of capital.

was not created in pursuance of any arrangement under which either (i) the consideration for the transfer was to be directly or indirectly provided; or (ii) the beneficial interest in the property in question was previously transferred by an outside person or company other than a company associated with either the transferor or transferee (*s*). For this purpose an outside company is an associated company of the transferor (or transferee) only if it is a company with limited liability, and is in such relationship with the transferor (or transferee) as would qualify a transfer between the third company, and the transferor (or transferee) for the same exemption (*t*). It has been held that the provision even of part only of the consideration by an outside company will mean the loss of the exemption, and that where an outside company, which is about to acquire all the shares in the transferee company, guaranteed a bank loan of part of the purchase money, such outside company was directly or indirectly providing part of the purchase money, since it would either provide the money to repay the loan itself (under its guarantee) or it would procure that it be provided by the transferee, the principal debtor, as its wholly owned subsidiary (*u*). It was not, however, decided whether the mere guarantee of the loan would by itself have amounted to the furnishing of part of the price, and it was not even argued that the making of the loan by the bank was the furnishing of part of the price. It seems possible therefore that the exemption will not necessarily be lost merely because the transferee company borrows the purchase money, though the lender might well be said to be providing it. It does not appear to be necessary that to the companies concerned or even one of them should have been incorporated in England or Scotland (*v*).

It is submitted that as voluntary disposition duty is calculated by reference to duty under the heading "Conveyance or Transfer on Sale" (*a*), a voluntary conveyance between two companies associated as above mentioned is exempt from duty.

An adjudication stamp is necessary on any instrument exempt under the section (*b*). The Commissioners may clearly ask for information or evidence in support of any claim for exemption under

(*s*) Finance Act, 1938, s. 50 (1).

(*t*) *Ibid.*, s. 50 (2).

(*u*) *Curzon Offices* v. *I. R. C.* [1944] 1 All E.R. 163, affirmed *ibid.*, 606. It was suggested by Goddard L.J. at p. 607, that the circumstance that the outside company was to acquire the whole issued share capital of the transferee company prevented the transferor company from being the beneficial owner.

(*v*) See *Nestlé & Co., Ltd.* v. *I. R. C.* [1953] Ch. 395, at p. 399.

(*a*) Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (1).

(*b*) Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 42 (1), proviso.

the section (*c*) and, in fact, though there is no express statutory authority, they sometimes call for a statutory declaration (*d*), by a solicitor or other person conversant with the transaction.

(2) **Amalgamation and Reconstruction of Companies.** With a view no doubt to avoiding any discouragement of the amalgamation or reconstruction of companies, provision has been made relieving instruments executed for those purposes from liability to stamp duty under the heading " conveyance or transfer on sale " and from capital duty where certain complicated conditions are satisfied. The conditions are laid down in section 55 of the Finance Act, 1927 (*e*), which is a long and somewhat bewildering section. An attempt will be made here to summarise its provisions, though this course entails the risk of misstating the law.

The section applies if, in connection with any scheme for the reconstruction of any company or companies, it is shown to the satisfaction of the Commissioners that a company with limited liability (called in the section " the transferee company ") is to be registered, or has been incorporated by Act of Parliament, or has increased its capital with a view to the acquisition of either (i) the undertaking (or part of the undertaking (*f*)), or (ii) not less than 90 per cent. (*g*) of the share capital of a particular existing company (referred to in the section as " the existing company ") (*h*), which must be a company incorporated in England or Scotland (*l*). It is to be noticed that, technically at least, the above matters must be shown to the Commissioners' satisfaction before the registration of the company in question, but after an incorporation by Act of Parliament or an increase of capital. It is believed that the Revenue will grant exemption where the application is made after the registration of the company. It is perhaps wiser to register the company with a small nominal capital and thereafter increase it with a view to the necessary acquisition. In order that the full exemption may be obtained, it is necessary that the memorandum of association, letters patent, or Act of Parliament, incorporating

(*c*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 12 (2).

(*d*) On the analogy of Finance Act, 1927 (17 & 18 Geo. 5, c. 20), s. 55 (5).

(*e*) 17 & 18 Geo. 5, c. 10, as amended by Finance Act, 1928 (18 & 19 Geo. 5, c. 17), s. 31, and Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 41.

(*f*) See Finance Act, 1927 (17 & 18 Geo. 5, c. 20), s. 55 (8).

(*g*) This percentage is reduced in relation to cotton spinning concerns: Finance Act, 1948 (11 & 12 Geo. 6, c. 49), s. 73. Apart from this reduction it is not sufficient to acquire such number of shares as shall together with those already held by the transferee company make up 90 per cent.: *Lever Bros., Ltd.* v. *I. R. C.* [1938] 2 K.B. 518. In this case it was tacitly assumed that 90 per cent. means 90 per cent. in nominal amount even with shares of different classes.

(*h*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (1) (a) and (b).

(*l*) *Nestlé & Co., Ltd.* v. *I. R. C.* [1953] Ch. 395. This case was decided on exemption from capital duty only. It would appear to extend to relief from conveyance on sale duty.

the transferee company should provide that one of its objects is the acquisition of the undertaking or shares of the existing company, or that it should appear from the resolution, Act, or other authority for the increase of capital that it was authorised for the purpose of such acquisition (*m*). It is, however, possible to secure exemption from duty under the heading " Conveyance or transfer on Sale " if this is not so provided, or indeed if the company has not been formed, or its capital increased, for the purpose of such acquisition (*n*), so long as the other requirements of the section are complied with.

It is further necessary to show that the consideration for the acquisition (except such part as consists in the transfer to, or the discharge by, the transferee company of liabilities of the existing company), consists, as to not less than 90 per cent. thereof (*o*), in the issue of shares in the transferee company (i) where an undertaking (or part of an undertaking) is acquired, to the existing company or holders of shares of the existing company, or (ii) where shares are acquired, to *the* holders of shares in the existing company in exchange for the shares held by them in the existing company (*p*). In cases of registered shares " issue " to holders in this context means placing them on the register of members, and the giving of renounceable letters of allotment is not sufficient (*q*), nor may nominees, even if genuine trustees for the persons concerned, be registered (*r*). Moreover, where shares are acquired, the Revenue claim (rightly it is thought) that the exact proportions in which the members held their shares in the existing company must be preserved (as to not less than 90 per cent.) in the transferee company (*s*), but this is not so where an undertaking or part of an undertaking is acquired.

(*m*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (3).

(*n*) *Ibid.*, s. 55 (2).

(*o*) Relaxed in relation to cotton spinning concerns: Finance Act, 1948 (11 & 12 Geo. 6, c. 47), s. 73. Where the consideration (except as above mentioned) consists as to less than 90 per cent. of shares it may be possible to appropriate shares to a part of the undertaking (see Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (8)) and other consideration to the rest and obtain relief on the transfer of the part acquired in consideration for shares and relief from a proportion of the capital duty (see *ibid.*, s. 55 (1) (A) (i)). It is believed, however, that the Revenue would disallow a claim on this basis.

(*p*) *Ibid.*, s. 55 (1) (c).

(*q*) *Oswald Tillotson, Ltd.* v. *I. R. C.* [1933] 1 K.B. 174.

(*r*) *Brotex Cellulose Fibres, Ltd.* v. *I. R. C.* (1930) [1933] 1 K.B. 158 (undertaking); *Murex, Ltd.* v. *I. R. C.* (1930) [1933] 1 K.B. 173 (shares).

(*s*) Where there is more than one class of share required and the classes are not reflected in the capital structure of the transferee company the proportion between the classes will be preserved by reference to the values of the different classes of share in the existing company. The provision as to " not less than 90 per cent." allows a small margin of error. Probably it is unnecessary that each shareholder should be registered as holder of 90 per cent. of his proportion.

It is also necessary, for the purpose of relief from conveyance duty, in cases where the transferee is (as is usual) a company incorporated under the Companies Acts, that the instrument of conveyance should be executed within twelve months from the date of the registration of the transferee company, or of its increase of capital (if relevant (*t*)), or executed in pursuance of an agreement which, or particulars of which, have been filed with the Registrar of Companies (*u*) within such period of twelve months (*a*).

If the foregoing conditions are fulfilled, then relief is afforded from capital duty on the original or, as the case may be, increased capital of the transferee company to the extent of the lesser of (i) the authorised capital of the existing company, or—where part of an undertaking is acquired—a fraction of that authorised capital corresponding to the fraction of the undertaking acquired (*b*); and (ii) the amount to be credited as paid up on the shares to be issued in consideration for the acquisition, and on the shares, if any, to be credited as paid up in consideration of the release of debts, or assignment to the transferee company of debts (which must have been incurred not less than two years before the proper date for claiming the exemption) of the existing company (*c*).

Further, if the foregoing conditions are satisfied (and in certain circumstances even if some of them are not (*d*)) relief is granted from duty, under the heading conveyance or transfer on sale, upon all instruments made for, or in connection with, the transfer of the undertaking or shares, or on any instrument made for the purpose of, or in connection with, the assignment to the transferee company of any debts of the existing company (*e*). Any such instrument must be adjudicated if the exemption is relied on (*f*).

The section contains provisions for the case where two or more companies or their shares are acquired (*g*), and for the repayment of duty paid on the transfer of shares at a time when it is not known whether a full 90 per cent. will be acquired, if in fact a full 90 per cent. is acquired within six months of the earlier of (i) the date of the first allotment of shares made for the purpose, or (ii) the

(*t*) See note (*n*), *supra*, as to the possibility of these not being relevant for purposes of relief from conveyance duty.

(*u*) Pursuant to Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 52. See Vol. 17, p. 500*n*.

(*a*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (1), proviso (b).

(*b*) *Ibid.*, s. 55 (1) (A) (i).

(*c*) *Ibid.*, s. 55 (1) (A) (ii) and proviso (c), as amended by Finance Act, 1928 (18 & 19 Geo. 5, c. 17), s. 31.

(*d*) See note (*n*), p. 267, *ante*.

(*e*) See Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (1) (B), as amended by Finance Act, 1928 (18 & 19 Geo. 5, c. 17), s. 31.

(*f*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (1), proviso (a).

(*g*) *Ibid.*, s. 55 (4).

date on which an invitation was issued to the shareholders of the existing company (*h*).

The Commissioners may (and usually do) require to be satisfied by statutory declaration of a solicitor or otherwise that the requirements of the section have been complied with (*i*).

In three cases it may happen that after the exemption has been allowed it may be forfeited and the amount of the duty may become payable as a debt to Her Majesty with interest at 5 per cent. These cases are (i) where any declaration, or other evidence furnished in support of a claim for relief, is found untrue (not necessarily fraudulently untrue) in a material particular (*k*), and (ii) if shares have been issued to the existing company (in consideration of the acquisition of an undertaking) and the existing company, within a period of two years from the incorporation or increase of capital of the transferee company, ceases to be the beneficial owner of the shares so issued to it, otherwise than in consequence of a reconstruction, amalgamation or liquidation (*l*), or (iii) if the transferee company has acquired shares in the existing company, and ceases within a like period to be the beneficial owner of the shares so acquired otherwise than in consequence of the reconstruction, amalgamation or liquidation (*m*). For the purposes of the last two foregoing cases a company ceases to be the beneficial owner of the shares if it ceases to be the beneficial owner of any of them (*n*).

Instruments not charged with stamp duty

There are a large number of instruments which though not exempt from all stamp duties are not liable to duty, either because they fall within a special exemption from duty and do not come under any other head of duty, such as a proxy for one meeting only (*nn*), or because there is no head of duty which covers them. In the latter class are instruments formerly subject to duty but now exempt, such as awards (*o*), and instruments never subjected to duty. Among the latter class are share and stock certificates,

(*h*) *Ibid.*, s. 55 (7).
(*i*) *Ibid.*, s. 55 (5).
(*k*) Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 55 (6) (a).
(*l*) *Ibid.*, s. 55 (6) (b).
(*m*) *Ibid.*, s. 55 (6) (c).
(*n*) *Att.-Gen.* v. *London Stadiums* [1950] 1 K.B. 387. It would seem that this is so even if the company in question continues to be beneficial owner of sufficient shares to have entitled it to the exemption if they had been the only shares acquired in the first place, at any rate if the holding of the shares disposed of was relied on in claiming the exemption.
(*nn*) See Vol. 17, p. 499.
(*o*) Finance Act, 1949 (12 & 13 Geo. 6, c. 47), s. 35, and Sched. VIII, Part I, para. 6.

and, it has been submitted (*oo*), debenture stock certificates, so long as there is no custom by which the right to the underlying shares, stock, or debenture stock can be transferred by delivery of the instrument (*p*).

There is, however, another instrument which is not, as such, subject to any duty but which calls for some consideration. The law of stamp duties on assents by personal representatives, like the general law of assents, is anomalous and owes its nature largely to its historical development. At common law an assent was the method by which an executor (and probably an administrator (*pp*)) released personal property (including leaseholds) to a specific or residuary legatee thereof. The assent was not a conveyance but an acknowledgment that such property (the title to which vested in the legatee by virtue of section 3 of the Wills Act, 1837 (*q*)) was not required for purposes of administration (*r*). Assents could be given by conduct or inference (*s*), and no instrument was required, save that in the case of registered shares and debentures of companies the regulations of such companies almost always required (and now must (*t*) require) an instrument of transfer. Such instrument of transfer is a conveyance, and if not liable to duty under any other head is liable to duty of 10s. on a conveyance or transfer (*u*). Real property, however, did not, until the Land Transfer Act, 1897 (*a*), vest in the personal representative at all (unless in his capacity of devisee) and no question of assent arose. Under section 3 of the Land Transfer Act, 1897 (*a*), it was provided that a personal representative (defined as including executor and administrator (*b*)) might assent to the vesting of real property in a devisee or at his option convey it to him. If he chose to assent he might do so by conduct (*c*), and if he assented in writing under hand only the assent did not require to be stamped 10s. as a

(*oo*) See p. 251, *ante*.

(*p*) As with certificates in the American form with blank transfer endorsed, as to the liability of which to duty see Finance Act, 1899 (62 & 63 Vict. c. 9), s. 4 (1) and (2), and *Noakes* v. *I. R. C.* (1900) 83 L.T. 714; *Speyer Bros.* v. *I. R. C.* (1902) 66 J.P. 551.

(*pp*) As at common law an assent operated only in favour of a legatee of personalty, a will was essential before there could be an assent. Where there is a will there is normally an executor. It appears that, at any rate, an administrator *durante minore aetate* could assent. See Williams on *Executors*, 13th ed., p. 224.

(*q*) 7 Will. 4 & 1 Vict. c. 26.

(*r*) *Attenborough* v. *Solomon* [1913] A.C. 76, *per* Viscount Haldane L.C. at p. 83.

(*s*) *Ibid.*

(*t*) Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 75; *cf.* as to units under a unit trust scheme: Finance Act, 1946 (9 & 10 Geo. 6, c. 64), s. 56 (4).

(*u*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Conveyance or transfer of any kind not hereinbefore described.

(*a*) 60 & 61 Vict. c. 65.

(*b*) *Ibid.*, s. 24 (2).

(*c*) *Wise* v. *Whitburn* [1924] 1 Ch. 460.

conveyance (*d*), as it was still merely an indication that the property was not required for purposes of administration (*e*). It was only if the assent was under seal, or if the personal representative elected to convey, that any liability to duty arose (*f*).

The law of assents relating to pure personalty has not been altered by the legislation of 1925. But substantial changes were made in the law of assents to freehold and leasehold land. First, section 3 of the Wills Act, 1837 (*g*), was modified so as to operate only to vest an equitable interest in the devisee (*h*). Secondly, it was provided by the Administration of Estates Act, 1925 (*i*), that a personal representative (which includes an executor or administrator (*k*)) may assent to the vesting in any person who by devise, bequest, devolution, appropriation, or otherwise, may be entitled thereto, of any estate or interest in real estate (which as defined (*l*) includes freeholds and leaseholds), and that an assent to the vesting of a legal estate must be in writing (*m*). The effect of the modification of section 3 of the Wills Act, 1837 (*n*), is that the vesting of a legal estate is now a conveyance even if the vesting is in the devisee. It is *a fortiori* so in any other case. But it is further provided by section 36 (1) of the Administration of Estates Act, 1925 (*o*), that section 36 shall not operate to impose any stamp duty in respect of an assent. It is thus clear that an assent by an executor (or, it is thought, an administrator) in favour of a legatee or devisee is still free of stamp duty even though it may be a conveyance. But this provision is not a general exemption of assents from stamp duty, and *ad valorem* duty is payable on an assent operating as a conveyance on sale (*p*), and it is possible also that it is payable on an assent as operating as a voluntary disposition *inter vivos* (*q*). It still remains possible that the fixed duty of 10s. (*r*) may be payable on other assents which operate as conveyances and could not before 1926 have been effected by assent

(*d*) *Kemp* v. *I. R. C.* [1905] 1 K.B. 581.
(*e*) *Ibid.*, *per* Phillimore J. at pp. 586–7.
(*f*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. Deed or Conveyance or transfer of any kind not hereinbefore described.
(*g*) 7 Will. 4 & 1 Vict. c. 26.
(*h*) Law of Property (Amendment) Act, 1924 (15 Geo. 5, c. 5), s. 9 and Sched. IX, para. 3.
(*i*) 15 Geo. 5, c. 23, s. 36 (1).
(*k*) *Ibid.*, s. 55 (1) (xi).
(*l*) *Ibid.*, ss. 3 (1) and 55 (1) (xix).
(*m*) *Ibid.*, s. 36 (4).
(*n*) 7 Will. 4 & 1 Vict. c. 26.
(*o*) 15 Geo. 5, c. 23.
(*p*) *G. H. R. Co., Ltd.* v. *I. R. C.* [1943] K.B. 303. See generally as to assents chargeable as conveyances on sale, Vol. 17, pp. 496–7 and 500*f*.
(*q*) See Vol. 17, pp. 376–7.
(*r*) Under Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I: Conveyance or transfer of any kind whatever not hereinbefore described.

at all, *e.g.*, where the assent is in favour of a person entitled on intestacy, or a person to whom land has been appropriated in satisfaction of a pecuniary legacy in exercise of a power of appropriation without the legatee's consent, or a person entitled pursuant to a family arrangement. It is wise to have such assents adjudicated as there are forceful grounds for supposing some of them liable to a duty of 10s.

Double Taxation Relief

There is no general relief from double stamp duties in different countries. But where an instrument is liable to stamp duty in both Great Britain and Northern Ireland, an instrument properly stamped in the one is deemed properly stamped in the other unless the duty in that other is higher when it must be stamped for the difference in that other (*s*). For this purpose where there is a composition operating in one country it shall (subject to any legislative enactment in the other), be deemed to be stamped with the amount that would have been payable but for the composition (*t*). There are similar provisions in relation to the Republic of Ireland (*u*).

(*s*) Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 29 (1), as amended by Irish Free State (Consequential Provisions) Act, 1922 (Session 2) (13 Geo. 5, c. 2), s. 1. See also Government of Ireland (Adaptation of Taxing Acts) Order, 1922 (S.R. & O. 1922, No. 80), para. 16.

(*t*) Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 29 (2).

(*u*) Relief in respect of Double Taxation (Irish Free State) Declaration, 1923 (S.R &. O. 1923, No. 406), Schedule, Part III.

(*Concluded*)

LIABILITY OF REALTY FOR THE PAYMENT OF LEGACIES

By Spencer G. Maurice, Barrister-at-Law

In an article entitled " Application of Assets: the Liability of Realty " in *The Conveyancer*, Vol. 14, p. 397, was examined the manner in which the payment of funeral, testamentary and administration expenses and the satisfaction of pecuniary legacies are to be met out of property of the deceased not disposed of specifically but included in a residuary gift. From the cases there considered it is apparent that, even since the Administration of Estates Act, 1925, came into force, residuary realty is not prima facie equally liable with residuary personalty for the satisfaction of pecuniary legacies, while para. 8 (a) of Part II of Schedule I to the Act permits the testator to vary as he pleases the order in which his assets are to be applied. Reference was made to *Re Thompson* [1936] Ch. 676 and *Re Anstead* [1943] Ch. 161 as showing that—variations by the testator apart—the manner in which the Schedule was meant to work was this : that the residue was to be divided notionally into two separate funds; that the first fund was to be set aside for use in satisfaction of the pecuniary legacies, this charge falling primarily on residuary personalty rather than residuary realty; and that out of the second fund, consisting of the balance of the residue and including residuary real estate, were to be paid the debts and testamentary expenses, resort being had to the first fund to pay such liabilities only when the second was exhausted.

Consideration was also given to the question whether or not a devise of realty is always specific, even though disposed of as residue, and it was suggested (accepting the view expressed in Jarman on Wills, 7th ed., vol. 2, p. 916 (see now 8th ed., vol. 2, pp. 936, 937), rather than that expressed in Theobald on Wills, 10th ed., p. 116) (*a*), that it was not : but how difficult it may be to determine whether a particular devise is residuary or not was illustrated by reference to *Re Ridley* [1950] Ch. 415 where Harman J., construing a devise by the testatrix of " all my real estate "

(*a*) This view has been abandoned by the learned editor of the 11th ed. of Theobald: see pp. 148, 149, where he points out that, although the proposition that a devise of realty was always specific might be true enough before the Wills Act, 1837, because a testator could only devise lands belonging to him at the date of his will, there was no longer any reason for upholding it since sections 3 and 24 of the Act had altered the law.

free of duty, followed by a gift of " the residue of my property," took the view that the gift of realty, though in the form of a general devise, was not a residuary gift, and that the gift of " the residue of my property " was a true residuary clause which would sweep up realty as well as personalty, if any were undisposed of. He based his decision in that case, however, on the fact that the testatrix by her will had varied the usual order of application of assets within the meaning of Sched. I, Pt. II, para. 8 (a) to the Administration of Estates Act, 1925.

The result of the directions of the testatrix in *Re Ridley* was, then, that the personalty had to bear, not only the pecuniary and specific legacies, but also the debts and death duties, including—contrary to the usual rule—the duty on realty, to the exclusion of the real estate, and, since these burdens exhausted it, it was necessary for the pecuniary legacies to abate. In the recent case of *Re Timson* [1953] 1 W.L.R. 1361 (noted *ante*, p. 87), on the other hand, the testatrix treated her estate as a single, indivisible entity, so as to cast upon the realty part of the burden of the pecuniary legacies.

The testatrix in *Re Timson* bequeathed certain specific and pecuniary legacies free of duty. In the final clause of her will she disposed of her residuary estate as follows: " I devise all my real estate and bequeath the residue of my personal estate unto my trustees upon trust (after payment thereout of my just debts funeral and testamentary expenses death and legacy duties) for my daughter . . . for her own absolute use and benefit." By a codicil the testatrix recited the final clause of her will and declared that, if her daughter should predecease her, then " I devise my said real estate and bequeath the residue of my personal estate unto my trustees upon trust [for sale and conversion] and to stand possessed of the net proceeds of such sale calling in and conversion and of my ready money in trust (after payment thereout of my just debts funeral and testamentary expenses death and legacy duties) to divide the residue thereof equally between . . . the sons of my daughter . . . as tenants in common." In all other respects the testatrix confirmed her will. The daughter survived the testatrix, so that the codicil was of no effect. After the funeral expenses and the debts had been paid, and the specific legacies handed over, the assets remaining were insufficient, without resorting to the realty, to pay the pecuniary legacies. The daughter claimed that the legacies were payable only out of the personalty, and that she alone was entitled to the realty, and the executors took out a construction summons in order that the point might be decided.

The words used by the testatrix in *Re Timson* in the final

clause of her will were the same as those used by the testator in *Re Rowe* [1941] Ch. 343—" I devise all my real estate and bequeath all the residue of my personal estate "—save only that the word " all " before " the residue " was omitted, and that in *Re Rowe* there was no direction " to pay thereout " the just debts, funeral and testamentary expenses, and death and legacy duties. In *Re Rowe* Farwell J., applying *Re Thompson*, held that para. 2 of Pt. II of Sched. I to the Administration of Estates Act, 1925, had not altered the pre-1926 law in regard to the payment of pecuniary legacies out of real estate, and that, accordingly, as the testator had not made the residue a mixed fund or given his real and personal estate as one mass, so as to bring in the rule in *Greville* v. *Browne* (1859) 7 H.L. 689 (which is to the effect that, where a bequest of pecuniary legacies is followed by a gift of the residue of the realty and personalty as one mass, the residuary realty is charged with the payment of those legacies in aid of the personalty), the pecuniary legacies were payable only out of the personalty.

Harman J., in *Re Ridley*, doubted whether Farwell J. was right in *Re Rowe* in holding that the real estate devised by the testator in that case was not, within the meaning of Schedule I to the Administration of Estates Act, 1925, included in the residuary clause: he pointed out that, having regard to the fact that the words there were " I devise all my real estate and bequeath all the residue of my personal estate " all in one sentence, that case was very much less strong than the one before him. He accepted, nevertheless, Farwell J.'s view that the law had not been altered by Pt. II of Sched. I to the Act.

Vaisey J., in *Re Timson*, remarked on the fact that *Re Rowe* had been criticised and doubted, but confessed, nevertheless, that at one time he thought that he must follow it : in the end, however, he found himself able to distinguish from it the case before him. In so doing the learned judge had regard to the codicil which, although itself of no effect, gave some assistance in construing the will. In the codicil the testatrix, although she disposed of her property in similar words to those used in her will—" I devise my . . . real estate and bequeath the residue of my personal estate "—gave it on trust for sale and to divide the proceeds between the beneficiaries named, and in so doing clearly treated it as a single, indivisible entity. " It is, in my judgment, almost incredible " said Vaisey J. (at p. 1364) " to regard the testatrix as having been careful to keep the real estate in existence as a separate item when she was leaving it to her daughter, and to make one fund of the realty and personalty when she was making the substituted provisions in her codicil for the sons of her daughter.

I incline to the view that she never contemplated anything of the kind and never contemplated any differentiation between her realty and personalty when she was considering the payment of these named sums of money. . . ." His Lordship went on to say that he took the view that the word " thereout " in the phrase " to pay thereout " referred to both the real and personal estate of the testatrix, and not merely the residue of the personal estate, though he emphasised the difficulty of construing it. In any event, he was inclined to think that the general scheme of the will indicated an intention on the part of the testatrix that the legacies should be paid somehow. Accordingly, he held that the pecuniary legacies were payable out of the whole estate, both real and personal.

Since only the daughter of the testatrix was interested in the residue it was, of course, unnecessary for Vaisey J. to give any direction as to the proportions in which the residuary realty and the residuary personalty were to bear the burden of the pecuniary legacies, but such a direction would have been necessary had different persons been interested in the residuary realty on the one hand and the residuary personalty on the other. An early authority on this question is a case in the Court of Chancery, *Roberts* v. *Walker* (1830) 1 R. & My. 752, where Sir John Leach M.R., in a case where a testatrix had made of her residuary realty and personalty a mixed fund and directed her debts, funeral and testamentary expenses and legacies to be paid out of the fund so created, held that the residuary realty and the personalty should bear *pro rata* the burdens cast upon them. But *Roberts* v. *Walker* must be considered in the light of *Elliott* v. *Dearsley* (1880) 16 Ch.D. 322, in which James L.J. in the Court of Appeal examined what was the liability of residuary realty and personalty respectively for the payment of legacies and how far the *pro rata* rule extended. Of *Roberts* v. *Walker* he said (at p. 329) that it ". . . went no further than this, that where a testator made a mixed fund, out of which he directed certain things to be paid, then to the extent of the things so mentioned the payment was to be made rateably out of the different parts of the fund. If the testator had only directed legacies to be paid out of the fund they must be paid rateably, but that would not make debts be payable rateably out of the realty and personalty; the rule of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the fund." It seems that to " expressly " might be added " or by necessary implication."

The limitation is further emphasised by *Re Ovey* (1885) 31 Ch.D. 113, in which the testator, after directing his executors to pay his debts and funeral and testamentary expenses and giving various

pecuniary legacies, gave all his personal estate and effects, except money or securities for money, to a named person, and gave and devised all the rest, residue and remainder of his estate, both real and personal, to trustees, upon trust, in the first place to pay thereout two specified sums, and as to the residue thereof, for hospitals of a charitable nature. Pearson J. held that the real estate was charged with the payment of legacies only in aid of the personal estate. He said (at p. 118): "It is admitted that there is no authority for saying that, when there is simply a charge of legacies upon real estate, that charge is anything more than ancillary to the personal estate, or that it can be enforced against the real estate when the personal estate is sufficient to pay all the legacies. The cases in which the produce of the real estate has been blended with the personal estate, and constituted one fund out of which the legacies are to be paid, are totally different from the present cases."

There was no such blending of the realty and the personalty in *Re Ovey* as there was (by virtue of the language of the codicil) in *Re Timson*, but it is to be observed that in the latter case there was no direction to pay legacies out of the blended fund—only debts, funeral and testamentary expenses, and death and legacy duties. It is submitted, therefore, that the facts of *Re Timson* exemplify the limitation of the rule of rateable payment laid down by James L.J. in *Elliott* v. *Dearsley*—"the rule of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the fund"—and that, had it been necessary to decide the point, the realty would have been held only to be ancillary to the personalty in the satisfaction of the pecuniary legacies.

In conclusion it may be observed that no attempt appears to have been made in *Re Timson* to argue that the gift of realty, though generally described and included in what was apparently a residuary clause, was, nevertheless, specific although such an argument, if successful, would obviously have redounded to the advantage of the daughter of the testatrix. This is perhaps surprising in view of the fact that the words used by the testatrix were, as already pointed out, similar to those used by the testator in *Re Rowe*. But *Re Timson*, in ignoring the possibility that the devise of realty was specific, seems to adopt the modern view that a devise of realty is not necessarily specific, and it may perhaps be accepted with confidence that the old view, that it is, is no longer a correct statement of the law.

THE LAW OF RATING

PART III

By William Scrivens, m.a., ll.b., Barrister-at-Law, and
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Annual Value

The amount which is payable in rates by the occupier of a rateable hereditament is dependent upon two factors, the amount of the current general rate and the rateable value of the hereditament. If, for example, the general rate for the current year is 15s. in the pound and the rateable value of the hereditament, as it appears in the valuation list, is £40, then the amount payable in rates for that year by the occupier will be 15s. × £40 = £30. The calculation of rateable value is thus a matter of prime importance in the law of rating and will now be considered more fully.

As has already been noted (*ante*, p. 49), the Statute of Elizabeth (*a*) did not provide any formula for determining the extent of liability to rates, nor for ensuring uniformity and equality of assessment. Judicial decisions established the principle that the rate must be made with equality (*b*), but it was not until the passing of the Parochial Assessment Act, 1836, that any general formula was prescribed. The Act of 1836 established the principle that rates should be assessed upon the annual rental value of land (*c*) and whilst the Act has since been repealed, this principle remains the basis of the modern law.

It is not, however, possible in every case to arrive directly at the rateable value of a hereditament by calculating the rent which a tenant from year to year would give for it. In a large number of cases the calculation of the annual rental value is merely the first step and certain deductions and allowances from this figure have to be made before the rateable value can be known.

The law relating to the calculation of rateable value is entirely statutory. So far as lands outside the County of London are concerned, the law is principally contained in the Rating and Valuation Act, 1925. Within the County of London the position is

(*a*) 43 Eliz. c. 2.
(*b*) *e.g.*, *R.* v. *Audley* (1700) 1 Const. 110; *R.* v. *Adames* (1832) 4 B. & Ad. 61, 66.
(*c*) s. 1.

principally governed by the Valuation (Metropolis) Act, 1869. Whilst there are certain differences between the two statutes, their provisions are basically similar.

Land outside the County of London

The Rating and Valuation Act, 1925, divides hereditaments outside the County of London into two categories, namely,

(i) hereditaments of the classes specified in Part I of the Second Schedule to the Act, and

(ii) all other hereditaments (*d*).

So far as a hereditament falling within the first category is concerned, the initial step is to determine " the rent at which [the] hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenants' rates and taxes . . . (*e*) and if the landlord undertook to bear the cost of repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. . . ." It is expressly provided that in calculating this annual rental value " no account shall be taken of the value of any services which the landlord renders, or procures to be rendered, to the tenant (either alone or in common with other tenants of the landlord) other than the provision of, or repairs to, or maintenance of the hereditament " (*f*). The figure so calculated is known as " the gross value " of the hereditament.

The second step is to deduct " from the gross value of the hereditament an amount representing the deduction specified with respect to hereditaments of that class in the second column of the . . . table [contained in Part I of the Second Schedule to the Act] and also, in the case of a hereditament subject to any rate, charge or assessment made by any commissioners of sewers or other like authority in respect of any drainage, wall embankment or other work for the benefit of the hereditament (not being a usual tenants' rate) such further amount as represents the average annual amount of that rate, charge or assessment. . . . " (*g*). The deductions specified in the second column of the table are percentages of the gross value, subject in some cases to an overriding maximum (*h*).

(*d*) s. 22 (1).

(*e*) The words omitted were repeated by the Tithe Act, 1936, s. 48 and the Ninth Schedule.

(*f*) s. 68.

(*g*) s. 22 (1) (a).

(*h*) The amount of these deductions has been subject to amendment by the Rating and Valuation Act, 1928, s. 2 (3) and the First Schedule: see also the Rating and Valuation Act, 1932, s. 1 (1) and the Rating and Valuation Act, 1937, s. 1 (1).

Thus, in the case of " houses and buildings without land other than gardens where the gross value exceeds £20 but does not exceed £40 " (*i*), the amount of the deduction is " £7 or an amount equal to 25 per cent. of the gross value whichever is the greater " (*i*). There is no fixed or maximum deduction, however, in respect of what are frequently known as " drainage rates " : the amount of such deduction is a matter of evidence. Where these two deductions, so far as appropriate, have been made from the gross value, the resultant figure is known as " the net annual value " of the hereditament (*g*). In the case of a hereditament falling within the second category—that is, a hereditament which is not specified in Part I of the Second Schedule of the Act—only one step is necessary to arrive at the net annual value. This involves estimating " the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all the usual tenants' rates and taxes . . . (*e*), and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. . . . " (*j*).

The practical effect of the above provisions is that whereas in the case of a hereditament within the first category the burden of repairs, insurance and other expenses to maintain the hereditament is deemed to be borne by the landlord, in the case of a hereditament within the second category this burden is deemed to be borne by the tenant. This difference is, however, reconciled by the making of the deductions specified in the Second Schedule in the case of a hereditament within the first category, so that it may be said that in the one case there are fixed allowances for repairs, insurance and other expenses and in the other case the net annual value is governed by the probable amount of such expenses. There is no specific mention of drainage rates with reference to the second category. Such mention is, however, unnecessary, since the amount of any such rate can be regarded as " expenses . . . necessary to maintain the hereditament in a state to command that rent . . . (*j*), which expenses are deemed to be borne by the tenant. Thus, in the first category drainage rates are initially deemed to be borne by the landlord, and are then deducted in arriving at the net annual value, whilst in the second category they are the tenants' burden and no deduction needs to be made. Finally it should be noted that although section 22 (1) (b) of the Act contains no express proviso such as appears in the definition of gross value in section 68, no account is to be taken of services rendered to the tenant by the landlord in the case of a hereditament within the second category, just as no

(*i*) Second Schedule, Part I, Class 3. (*j*) s. 22 (1) (b).

account is to be taken of such services in the case of a hereditament within the first category.

Classification of hereditaments in the Rating and Valuation Act, 1925

Now that the two methods of arriving at the net annual value have been described, the classes of hereditament falling within the first category may be enumerated. There are three chief classes, namely:

(i) Houses and buildings without land, other than gardens.
(ii) Land (other than agricultural land) with buildings valued together as one hereditament.
(iii) Land (other than agricultural land) without buildings (*k*).

A note to Part I of the Second Schedule specifically provides: "For the purposes of this Part of this Schedule the expression 'houses and buildings' does not include mills, manufactories or premises of a similar character used wholly or mainly for industrial purposes, or hereditaments valued as part of any railway, dock, canal, gas, water, electricity or other public utility undertaking." It would appear that in order that a hereditament may be within the first of these classes it does not need to comprise both houses and other buildings, but that the existence of either will suffice (*l*). Moreover, any land which is necessary for the enjoyment of the houses or buildings as such is to be regarded as part of the houses or buildings, so that the hereditament will remain within the first of the three classes (*m*).

At first sight it would appear that mines, quarries and brick fields fall within the second or third of these classes, but in practice it has always been assumed that they are altogether outside Part I of the Second Schedule, so that no gross value has to be ascertained for them. Such an assumption avoids the injustice of making a fixed and inadequate allowance for the repair of such hereditaments and may, perhaps, be justified upon the grounds that such hereditaments are of a similar character to "mills and manufactories" (*n*).

Land within the County of London

The Valuation (Metropolis) Act, 1869, does not divide hereditaments into two categories as does the Rating and Valuation Act, 1925. In the case of a hereditament within the County of London, the first step is to determine its gross value. "Gross value" is

(*k*) Second Schedule, Part I.
(*l*) *Godber* v. *Bedford Assessment Committee* (1929) 10 R. & I.T. 177.
(*m*) *Stansfield* v. *Stockport and Hyde Assessment Committee* (1939) 30 R. & I.T. 277.
(*n*) See Ryde on *Rating*, 9th ed., p. 221.

defined by section 4 of the Act as " the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament if the tenant undertook to pay all usual tenants' rates and taxes . . . (*e*) and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." It will be observed that this definition of gross value is substantially similar to that contained in section 68 of the Rating and Valuation Act, 1925.

The second step is to deduct from the gross value so calculated " the annual average cost of the repairs, insurance and other expenses as aforesaid " (*o*). Section 52 of the Act provides, however, that " the percentage or rate of deductions to be made from the gross value . . . shall not exceed the amounts in the Third Schedule to this Act, so far as the same are applicable." The Third Schedule classifies hereditaments and specifies maximum rates of deductions in a way similar to the Second Schedule of the Rating and Valuation Act, 1925, but unlike the latter, it specifies a maximum rate of deduction for " mills and manufactories " (*p*). So far as railways, canals, docks, tolls, waterworks, gasworks, and all rateable hereditaments not otherwise classified are concerned, the Third Schedule expressly provides that there shall be no maximum deduction, but that the amount of the deductions are " to be determined in each case according to the circumstances and the general principles of law." (*q*).

The figure ascertained by making these deduction from the gross value was originally termed the rateable value (*r*), but in order to produce uniformity of terminology both within and without the County of London, it was enacted by section 7 (1) (a) of the Rating and Valuation (Apportionment) Act, 1928, that this figure should thereafter be known as " the net annual value."

Dwelling-houses

Prior to the passing of the Local Government Act, 1948, the gross value of dwelling-houses was ascertained in accordance with the provisions of the Rating and Valuation Act, 1925, or of the Valuation (Metropolis) Act, 1869, as appropriate. The Act of 1948, however, provided (*s*) that the gross value of dwelling-houses as therein defined should be ascertained not by reference to annual

(*o*) s. 4, definition of " rateable value."
(*p*) Class 8.
(*q*) Classes 10 and 11.
(*r*) s. 4.
(*s*) Part IV, s. 74–82.

rental value, but by reference to the hypothetical cost of the site and of construction in 1938. No valuation lists were, however, ever prepared in accordance with this new principle and the relevant provisions have now been repealed by the Valuation for Rating Act, 1953 (*t*). The Act of 1953 does not, however, effect a reversion to the position as it existed before 1948, but provides that the gross value of dwelling-houses shall be ascertained by reference to their annual rental value on or about June 30, 1939. The provisions of this Act will be considered in greater detail hereafter. Suffice it for the moment to say that no valuation lists have yet been prepared in accordance with the Act, and that in all current valuation lists and amendments thereof the gross value of dwelling-houses has been ascertained in accordance with the general principles of the Rating and Valuation Act, 1925, or of the Valuation (Metropolis) Act, 1869.

Rateable value

Both within and without the County of London, the net annual value of hereditaments will in the majority of cases also be their rateable value. The Local Government Act, 1929, however, provides that in the case of industrial and freight transport hereditaments there shall be a further scaling down of the net annual value in order to arrive at the rateable value. A further though less important exception is contained in the Rating and Valuation Act, 1925, which provides that further deductions shall be made from the net annual value in the case of "land used as a railway constructed under the powers of any Act for public conveyance or as a canal or towing-path for a canal [and] any land covered by water . . . " (*u*), always provided that such lands are situated within county boroughs or urban districts outside the County of London. Further consideration will be given to both these exceptions at a later stage.

The ascertainment of annual rental value

The statutory provisions above described are designed to ensure that the occupational value of land shall be measured by a uniform but flexible standard. The standard prescribed is that of a letting by the year. This standard has to be applied to all rateable hereditaments which are occupied in order that all occupiers may be rated, regardless of the legal nature of their interests in the lands which they occupy. The owner in occupation must be rated as well as the tenant. The occupier of a hereditament which is rarely, if

(*t*) s. 1.
(*u*) s. 22 (1) (c) and Second Schedule, Part II.

ever, let by the year, such as a gasworks, must be rated as well as the occupier of a hereditament frequently so let. Valuations for rating are concerned with hypothetical lettings of actual premises to hypothetical tenants : they are not primarily concerned with actual lettings or with actual tenants. The significance of such actual lettings is at the most evidential. As was said by Lord Buckmaster in *Poplar Assessment Committee* v. *Roberts* [1922] 2 A.C. 93 at p. 104 : " From the earliest times it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is to be levied, and the standard in the Act (*v*) is nothing but a means of finding out what the value of that occupation is. . . ." And again at p. 103 : " The tenant referred to is an imaginary person : the actual rent paid is no criterion unless indeed it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. Although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made."

The hypothetical tenant

Although the tenant is an imaginary person, it is also true that all persons who would have a motive for occupying the lands if they were vacant and to let must be considered as possible tenants (*w*). " The question to be answered is : Supposing [the lands] were vacant and to let, what rent might reasonably be expected to be obtained for them ? " (*x*). The owner in occupation is to be considered as a possible tenant just as much as anybody else. " The directions given by the Act (*y*) are equivalent to saying that one must look at all possible tenants and the phraseology does not exclude an owner who himself occupies the premises " (*z*). The importance of being able to consider the occupying owner as a possible tenant is well illustrated by those cases in which occupation of the hereditament is financially unprofitable, but the owner occupies it for the discharge of a statutory duty. Thus, in *Burton-upon-Trent Corporation* v. *Burton-upon-Trent Union Assessment Committee* (1889) 24 Q.B.D. 197, the corporation were the owners and occupiers of a sewage farm and pumping station. It was found that the sewage farm and pumping station could not be worked

(*v*) The Valuation (Metropolis) Act, 1869.
(*w*) *R.* v. *School Board for London* (1886) 17 Q.B.D. 738.
(*x*) *Per* Lord Herschell, *L.C.C.* v. *Erith and West Ham* [1893] A.C. 562, 588.
(*y*) The Valuation (Metropolis) Act, 1869.
(*z*) *Per* Lord Esher M.R., *R.* v. *School Board for London* (1886) 17 Q.B.D. 738, 740.

except at a loss, that if the corporation decided to let them, no tenant could be found to take them at even a nominal rent; but that if the farm and station belonged to a private owner, the corporation would be willing to take them at a substantial yearly rent in order to discharge their duties. Upon these facts the court held that the premises were properly valued at the rent which the corporation would give (*a*). Moreover, the fact that the occupying owner is by law incapable of holding land as a tenant does not prevent his being considered as a possible tenant for rating purposes (*b*).

The owner out of occupation is also to be considered as a possible tenant, even though he has in fact let the hereditament. In *Davies* v. *Seisdon Union* [1908] A.C. 315, a sewage farm was let to a farmer by the sewerage board. The sewerage facilities were of no value to the farmer, although they were of value to the board. The House of Lords held that in determining the annual rental value of the farm, the benefit both to the farmer and to the board must be considered. Lord Loreburn L.C. said (*c*): "Why are we not to ask what rent would be given by a hypothetical tenant who had both purposes to serve and would pay a rent according to its double capacity? Manifestly, if the property were owned by someone other than the board, the latter would be such a tenant. . . ."

The fact that the tenant who might reasonably be expected to offer the highest rent would wish to take the premises not for his own occupation but in order to sublet them, does not prevent his offer from constituting the annual rental value of the premises. "The motives which actuate buyers in a market may be of all kinds, but it is not their motives, but their bids which matter" (*d*).

The tenancy from year to year

Many hereditaments which are rateable are scarcely ever let upon a yearly tenancy, so that there exists no economic market in such tenancies. This difficulty does not, however, enable the test of a letting by the year to be disregarded, although it renders its application more difficult. In *Smith* v. *Birmingham* (*Guardians*) (1889) 22 Q.B.D. 211, 703, the hereditament under consideration was a small house of the type which, it was objected, could in practice only be let by the week to tenants who were not always

(*a*) See also *L.C.C.* v. *Erith and West Ham* [1893] A.C. 562; *R.* v. *School Board for London* (1886) 17 Q.B.D. 738, 740.

(*b*) *L.C.C.* v. *Erith and West Ham* [1893] A.C. 562 overruling *Owen's College* v. *Chorlton-upon-Medlock* (1887) 18 Q.B.D. 403.

(*c*) At p. 318.

(*d*) *Per* Lord Macmillan, *Robinson* (*Brewers*), *Ltd.* v. *Durham Assessment Committee* [1938] A.C. 321.

punctilious in the payment of their rent. The court, however, dismissed the objection, Wills J. saying (*e*): "It is to no purpose to say that such property cannot in practice be let by the year: no more can railways, canals, docks or gasworks. The Act of Parliament requires the assumption of a tenancy from year to year to be made. . . . You must assume a landlord willing to take by the year; and having done so, you must get in the best way you can at the rent . . ." (*ee*).

Whilst one is bound to postulate a tenancy from year to year, one is not bound to assume that the hypothetical tenant will not be able to hold over at the end of the year. "It is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. . . . The possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account" (*f*).

Condition of the premises

Although both the tenant and the tenancy are hypothetical, the premises which are to be valued and which are notionally the subject of the tenancy, are actual. In assessing the annual rental value of a hereditament, account is to be taken of its condition and use at the time when the valuation is made, and not of its probable future condition or use. Land without buildings must be valued as such. If buildings are subsequently erected, the value of the land will rise, but so long as the land is void of buildings no account can be taken of the fact that buildings may be erected in the future. A hereditament must be assumed to be let for the purpose for which it is in fact being used. A house is to be valued as a house and not at the higher rental value which it might have if converted to some other purpose, such as a shop. "The true principle according to which the value of the occupation to the hypothetical tenant . . . is to be estimated, is to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to apear that those circumstances are about to undergo a change" (*g*).

If premises are occupied, but the occupier chooses to make little use of them, this does not reduce their annual rental value. The

(*e*) At p. 219.
(*ee*) For a further discussion of this case, see *infra*, p. 292.
(*f*) *Per* Cockburn C.J., *Great Eastern Ry.* v. *Haughley* (1886) L.R. 1 Q.B. 666.
(*g*) *Per* Cockburn C.J., *R.* v. *Fletton* (1861) 3 E. & E. 450.

hypothetical tenant is to be assumed to make the fullest use of which the premises are capable in their present condition (*h*). The position is, however, different if premises cannot owing to extraneous circumstances be used for the purpose for which they are naturally suited, and if these circumstances would affect the hypothetical tenant as they do the actual occupier. In *Staley* v. *Castleton* (1864) 33 L.J.M.C. 178, a cotton mill which contained machinery was closed owing to the American Civil War. The machinery was, however, kept clean and ready for immediate use. It was held that annual value of the mill was the rent which it would command as a warehouse for the machinery, and not the rent which it would command if full working were possible. Blackburn J. said (*i*): "The hypothetical tenant would give nothing for it as a cotton mill. It is possible that the present state of things will improve, and that a tenant could be found who would be willing to take it for a term on a larger rent, reckoning that that supposition will be realised. But that is not the way the probable rent is to be arrived at. . . . The legislature intended that the rate should be made upon the rent which might be reasonably expected from a tenant who took the property from year to year, *rebus sic stantibus*. . . . Deferred and reversionary prospects are not to be taken into account" (*j*).

In *Hoyle and Jackson* v. *Oldham Union* [1894] 2 Q.B. 372, a strike occurred which caused a stoppage of work at cotton mills two days before the mills were due to be assessed. During the stoppage the mills were used only as warehouses for the machinery and chattels which they contained, but by the time the mill owners' objection to the valuation list came to be heard the strike had ended. The assessment committee refused to amend the list and it was held on appeal that their decision was justified, because it was not possible, at the time when the list was made, to estimate whether or not the strike would last sufficiently long to affect the rent which the hypothetical tenant would give. This decision is not, it is submitted, an authority for the proposition that the existence of strikes which render factories idle is to be disregarded when assessing the annual value of the factories. Certainly the general contingency of strikes will affect the rent which the hypothetical tenant would offer and it was accepted in *Hoyle's* case that this factor should be taken into

(*h*) *e.g.*, *Gage* v. *Wren* (1903) 67 J.P. 32; *Bayliss* v. *Chatters* [1940] 1 All E.R. 620.

(*i*) At p. 182.

(*j*) See also *Harter* v. *Salford Overseers* (1865) 34 L.J.M.C. 206; *Townley Mill* (1919) *Ltd.* v. *Oldham Assessment Committee* [1937] A.C. 419. The use of premises as a warehouse for machinery must now be considered with reference to s. 24 (1) (a) of the Rating and Valuation Act, 1925.

account. There seems to be no reason in principle why the effect of an actual strike upon the mind of the hypothetical tenant should not also be considered (*k*).

Legal restrictions affecting the premises

In assessing the value of a hereditament account must be taken not only of its physical condition and of the general economic circumstances which affect its use, but also of any general provisions of law which affect its occupational value. Thus, in *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* [1895] A.C. 136, the company were prohibited by statute from taking any tolls for the use of the railway and tram lines forming part of their docks. It was contended that in assessing the annual value of the docks this statutory prohibition was to be disregarded and that the hypothetical tenant must be assumed to be free to charge such tolls and to offer a higher rent accordingly. The House of Lords held this contention to be wrong. Lord Herschell said (*l*) : " In the present case the dock company is to be taken into account . . . in considering hypothetical tenants. . . . But the question is whether you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn any profit at all. . . . The latter is the state of affairs which must be taken into account, and any other course would lead not only to absurdities, but to the gravest injustice as regards the rating imposed."

Any restrictions of use, however, which are imposed by the actual tenancy agreement under which the occupier holds the land to be rated are to be disregarded, for the land is to be valued as if let upon the terms postulated by Parliament and upon no others. Thus, in the case of a " tied " public house, its value is not to be assessed as if the hypothetical tenant took a yearly tenancy of it subject to the same tie (*m*). " The question is not what rent will a particular individual give, but what will the hypothetical tenant give: it is on this ground that ' tie ' is disregarded in valuing tied houses : the hypothesis deals with the ordinary individual, not with a man bound by special covenants " (*n*).

It has also been held in *Poplar Assessment Committee* v. *Roberts* [1922] 2 A.C. 93, that in calculating the annual rental value of

(*k*) See Ryde on *Rating*, 9th ed., pp. 250, 251.
(*l*) At p. 150.
(*m*) *Overseers of Sunderland* v. *Sunderland Union* (1865) 34 L.J.M.C. 121; *R.* v. *Shoreditch Assessment Committee* [1910] 2 K.B. 859, 883.
(*n*) *Per* Farwell L.J., *R.* v. *Shoreditch Assessment Committee* [1910] 2 K.B. 859, 883.

dwelling-houses to which the Rent and Mortgage Interest (Restriction) Acts apply, the standard rent as fixed by those Acts is not to be regarded as fixing the upper limit of their value for rating purposes. The rent which the hypothetical tenant might reasonably be expected to pay is to be determined without reference to Acts which restrict the actual rents payable by actual tenants. The effect of each legislation is not to restrict the use or benefit which may be lawfully derived from the premises by the occupier. " So far as the occupier is concerned, the provisions of the Rent Restriction Acts have not in any way made his occupation less beneficial. It is the landlord who is affected and he, as landlord, is not the subject of assessment " (*o*). Accordingly, it would not be right to add to the benefit of a restricted rent the further benefit of a reduced rateable value. To do so, moreover, would be to destroy the uniformity of valuation which the test of letting by the year is designed to achieve. For if regard were to be had to the Rent Restriction Acts, two physically identical houses, one occupied by its owner and the other by a tenant, might have very different rateable values. As was said by Lord Sumner (*p*) : " I think that the word ' rent ' must be held to mean something which at any rate is not conditioned by the legal relations which exist between an actual landlord and an actual tenant. . . . Rating is a process between an occupier and a rating authority, to the determination of which the landlord and lessee are strangers " (*r*).

Evidence of annual rental value

The valuer who seeks to assess the occupational value of a hereditament for rating purposes, is required by statute to assume that the hereditament is let upon a yearly tenancy to a tenant who undertakes to pay all usual tenant's rates and taxes. He is then required to calculate the rent which such a tenant might be expected to pay. It is, however, only rarely that the hereditament under consideration is in fact let upon terms identical with those which the valuer is required to assume. Consequently he is invariably faced with the question : From what evidence is the annual rental value to be deduced ?

In considering this problem of evidence, it is necessary always to bear in mind that " the objective being the real value of the

(*o*) *Per* Lord Buckmaster, p. 103.
(*p*) At p. 116.
(*r*) In practice the assessments made upon the smaller type of houses have been below the rents which would have been obtained for them in the market, in order not to impose too great a burden on their occupiers. The Valuation for Rating Act, 1953, attempts to deal with this problem by establishing a 1939 standard of values.

actual hereditament, the inquiry is primarily economic and not legal : it is only legal in so far as logical relevance is the measure of legal admissibility " (*s*). Appellate courts do, however, require that assessments shall be made upon the best evidence available.

What is the best evidence of annual rental value necessarily depends upon the type of hereditament to be valued and it is not easy to enunciate principles of general application. Broadly speaking however, hereditaments are of two main types, those which are commonly let on terms bearing some resemblance to those which the valuer is required to assume, and those which are rarely let at all, or if let, are let otherwise than at a rack-rent. So far as the first type is concerned, there exists a market by reference to which annual rental values can and must be calculated. In the case of the second type of hereditament, recourse must be had to other matters, such as the profit-earning capacity of the hereditament or its constructional value, in order to arrive at the annual rental value.

Evidence of actual rents

" Where the particular hereditament is let at what is plainly a rack-rent or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason is alone admissible; indirect evidence is excluded not because it is not logically relevant to the economic inquiry, but because it is not the best evidence " (*t*). Whilst however, evidence of such lettings and rents is the best evidence, it is not conclusive. Such rents may always be shown to have been fixed by reference to matters which would not concern the hypothetical tenant and so to be in need of some adjustment before they represent the true annual rental value of the land. Thus it may be shown that the rent includes a payment for " the goodwill " of the business previously carried on at the premises; or it may be shown that the rent was fixed not by the " higgling of the market," but by personal considerations operating between the particular landlord and tenant. Another matter of significance is the date at which the rent was fixed, for it may be that between that date and the date of the valuation, market conditions have altered so as to make the annual rental value a higher or lower figure.

(*s*) *Per* Scott L.J., *Robinson Brothers (Brewers), Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [1937] 2 K.B. 445, 470; affirmed [1938] A.C. 321.

(*t*) *Per* Scott L.J., *ibid.*, at p. 468.

Tenant's rates and taxes

The " tenant's rates and taxes " do not include land tax (*u*). " Water rate " charged on premises for water supplied is not a rate in the true sense, but is rather a charge for the supply of a necessity personal to the occupier. Accordingly its effect must be eliminated when calculating annual rental value from actual rents. If the landlord undertakes to pay such water rate, the rent which the tenant pays will be higher than if he himself paid the rate, and the amount of the rate must be deducted from the rent. If the tenant pays his own water rate, the rent is, of course, not affected (*v*).

If the landlord pays the general rates, a deduction from the tenant's rent must also be made in respect of this payment. The amount to be deducted for rates must not be calculated upon the rent which the tenant actually pays as if this were the net annual value. If after due allowance has been made for the cost of repairs and all other proper costs, the remaining figure of annual rent is £90 and the rates amount to 10s. in the pound, the sum to be deducted is not £45, but £30. The net annual value (which is here assumed to be the same as the rateable value) is £60, the rates calculated at 10s. in the pound on that figure total £30, and the two sums when added together, are equal to the rental figure of £90. The calculation necessary to arrive at the net annual value may be expressed as follows :

$$\frac{20}{(20 \times 10)} \times £90 = \text{N.A.V.}$$

The rate in the pound which is likely to be levied in the future should be taken in making the above calculation, because the hypothetical landlord and tenant would be more influenced in fixing the rent by the rate likely to be levied during the year of the tenancy than by any rate levied in the past (*w*).

Where property is let to tenants upon weekly tenancies, it is sometimes practice to make some allowance from the annual aggregate of weekly rents for the risks of the property remaining empty or of the rents being unpaid and for the expenses of collection of the rents. The justification for making these allowances is that these considerations would affect the mind of the hypothetical tenant

(*u*) *Goodchild* v. *St. John, Hackney Trustees* (1858) E. B. & E. 1, 47.

(*v*) *Smith* v. *Churchwardens of Birmingham* (1889) 22 Q.B.D. 211.

(*w*) *Stepney Borough Council* v. *Moore* (1906) 1 Konstam 14; see Ryde on *Rating*, 9th ed., p. 231, for the adjustments necessary where differential rating is in force, or where a local Act requires the owner to pay a portion of the rates the whole of which are actually payable by the tenant.

taking the property upon a yearly tenancy in order to sublet to weekly tenants (*x*).

It is expressly provided by the proviso to the definition of " gross value " in section 68 of the Rating and Valuation Act, 1925, that in calculating gross value no account is to be taken of services rendered by the landlord to the tenant. Where the landlord provides such services, their value must therefore be deducted from the rent paid before it can be said to represent the annual rental value of the premises. So far as land within the County of London is concerned, it is clear, since the decision in *Bell Property Trust, Ltd.* v. *Hampstead Assessment Committee* [1940] 2 K.B. 543 (*y*) that the same rule applies, even though the Valuation (Metropolis) Act of 1869 contains no such express proviso.

Where the annual rental value of a flat in a block of flats has to be ascertained, no part of the value of common passages and staircases is to be added to the value of the flat (*z*). It does, however, appear from the *Bell Property* case that it is proper to deduct the amount of the landlord's expenses in repair and maintenance of these common parts of the block when seeking to adjust the actual inclusive rent paid to a figure of gross value. The landlord is entitled to a profit from the services rendered to his tenants, so that in consequence a figure which is more than the bare cost of rendering the services must be deducted from the inclusive rents (*a*).

Evidence of profits

" . . . A difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be recognised that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way " (*b*). The lack of a letting market in hereditaments of the type which has to be valued, may necessitate recourse to other methods of calculating the annual rental value, but it should always be remembered that the object

(*x*) In *Smith* v. *Churchwardens of Birmingham* (1889) 22 Q.B.D. 211, 703, the court refused to sanction these allowances, but there was a finding of fact that the annual rent of the house would be fifty-two times the actual weekly rent.

(*y*) Overruling *Pullin* v. *St. Saviour's Union* [1900] 1 Q.B. 138.

(*z*) *R.* v. *St. George's Union* (1871) L.R. 7 Q.B. 90.

(*a*) [1940] 2 K.B. 543. This is the law which governs present valuation lists, but for the future the position will be governed by the Valuation for Rating Act, 1953.

(*b*) *Per* A. L. Smith L.J., *Liverpool Corporation* v. *Llanfyllin Assessment Committee* [1889] 2 Q.B. 14, 20.

of the inquiry is to discover the rent which the hypothetical tenant would give for the hereditament. Where the hereditament to be valued is normally occupied for purposes of financial profit and it is not possible to arrive at its annual rental value by a consideration of actual rents, then it is permissible to have regard to the profits which the hypothetical tenant might be expected to earn on the hereditament. " In the case of premises used only for the purpose of making a profit . . . and not capable of being valued by comparison with other similar premises, the proposed tenant and landlord would alike be thrown back on the question of the amount of possible profits to flow from the occupation " (*c*). The rent which a tenant carrying on business pays to his landlord is paid out of the receipts of the business. The amount which he will be willing to pay in rent is therefore necessarily influenced by the amount of money or profit which he can expect to earn on the premises. The rent which he will be willing to pay will not, however, be affected by profits which are dependent upon his personal business skill alone, for he can exercise his skill where he will. It is only in so far as the premises themselves afford the opportunity of earning profits, that the rent will be affected. " The annual rent of a shop in Cheapside is higher than the annual rent of a similar shop in a back street: and . . . the reason why tenants give a higher rent is because of the superior facility for carrying on business there. But the rent and rateable value of the shop are quite independent of the amount of the shopkeeper's actual gains " (*d*). The business opportunities which premises afford is one of the factors which influence the rent in the letting market, and it is only in so far as the prospect of profits does in fact influence rent that reference to profits, where no such market exists, for the purpose of rating valuations can be justified.

There is not, as a matter of law, only one way in which rent may be assessed by reference to profits. The formula which is usually known as " the profits basis " is used for the rating of public utility undertakings, and is in fact a formula based to some extent upon the constructional value of parts of the hereditament (*e*). All assessments of rent by reference to profit do, however, have one thing in common. They calculate the sum which the tenant might be expected to have left at the end of a year's trading after payment of all proper expenses other than rent. From this

(*c*) *Per* Wrottesley J., *Racecourse Betting Control Board* v. *Brighton Rating Authority* [1941] 2 K.B. 287.

(*d*) *Per* Blackburn J., *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1873) L.R. 9 Q.B. 84, 97.

(*e*) For a description of this formula see the judgment of Lord Cave in *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331.

sum (which is often called "the profit") there is deducted the amount which the tenant would expect to keep for himself as his profit. The remaining figure is then treated as the rent which he would be prepared to pay to his landlord.

The type of hereditament for which a valuation may properly be made on a profits basis can best be illustrated by a consideration of some of the more important cases.

In *R.* v. *Verrall* (1875) 1 Q.B.D. 9, the hereditament to be rated was a racecourse: it was held that the occupier's books of account were admissible in evidence to show the annual rental value of the racecourse, Field J. expressing the view that due allowance could be made when considering such accounts for the peculiar skill of the occupier (*f*). This decision has been followed and extended to totalisators in *Racecourse Betting Control Board* v. *South Middlesex Assessment Committee* (1939) 31 R. & I.T. 56, and in *Racecourse Betting Control Board* v. *Brighton Corporation* [1941] 2 K.B. 287. It should be noted, however, that in *Racecourse Betting Control Board* v. *Doncaster Rating Authority* (1948) 41 R. & I.T. 572, it was held by the arbitrator that the agreement between the Board and the Doncaster racecourse as to the terms on which the Board could rent sites for totalisators afforded the best evidence of their annual rental value, and he declined to base his valuation upon the profits likely to be made. This decision illustrates the rule that the use of a profits basis is only justified where better evidence of rental value is not available and it is certainly not the law that the annual rental value of racecourses and totalisators must always be calculated upon a profits basis.

In *Clarke* v. *Fisherton-Augar* (1880) 6 Q.B.D. 142, the occupier and lessee of refreshment rooms on Salisbury railway station sought to establish by production of his accounts and by proof that he was trading at a loss, that the rent of £1,000 reserved under his tenancy agreement with the railway company did not represent the annual rental value of the premises. It was held that he was entitled to adduce such evidence. Field J. said (*g*): "The appellant . . . contended . . . that although in the case of twenty houses in a street all of the same size and let to the same class of tenant, you might ascertain the annual value upon some general principle . . . , yet that did not apply here, because you could not find another refreshment room in the same area, nor could you find another refreshment room on the South Western Railway at Salisbury. All the elements of value depend upon where it is, and what it is. . . ."

(*f*) At p. 11.
(*g*) At p. 142.

It was the unique nature of the hereditament that entitled Quarter Sessions to receive evidence of trade receipts.

Another case illustrative of the application of a profits basis to an exceptional hereditament is *Amalgamated Relays, Ltd.* v. *Burnley R.A.* [1950] 2 K.B. 183, where it was necessary to ascribe a rateable value to wires forming part of a wireless relay service in Burnley. The Divisional Court upheld an assessment based on profits. Lord Goddard C.J. said (*h*): " . . . The position at the present moment is that the company can say to any intending tenant, if it were minded to let at a rent, that it had a system which was working: that nobody else had it: that it was unlikely that any competition would come into the market. . . . Therefore there is nothing from what is being obtained from comparable hereditaments to show what a tenant would be likely to pay. The landlord would be in a position to say that if he let to the prospective tenant he would be putting him into a position in which he could make substantial profits and that he, the landlord, wanted a share of them."

Finally there is the case of *Surrey County Valuation Committee* v. *Chessington Zoo, Ltd.* [1950] 1 K.B. 640. The hereditament to be valued was a zoological garden and amusement park which enjoyed a " quasi-monopoly " in the South of England. It was found by quarter sessions that there were no comparable hereditaments which could be considered in assessing the annual rental value and that any prospective tenant would have regard to the profit which he could earn in calculating the rent he would be prepared to pay. Accordingly quarter sessions calculated the annual value on a profits basis. The company in occupation contended that the assessment ought to have been made on a " contractors' basis " (*hh*). The Divisional Court, however, held (Cassels J. dissenting) that quarter sessions had not erred in law in applying the profits basis, because the hereditament was of an unusual character. Rejecting the company's basis of valuation, Goddard C.J. said that it was not right " to start by finding out the figure which would be paid as rent were the premises to be used for domestic . . . purposes, and then to consider how much it would cost to erect the cages, restaurant and other buildings . . . to charge so much upon the tenants' capital and then take those figures and add something for the peculiarly favourable transport facilities. I think that we ought to look at the position as though a landowner had premises to offer equipped for a zoo and amusement park . . . " (*i*). Cassels J. in a dissenting judgment

(*h*) At p. 190.
(*hh*) See below, p. 297.
(*i*) At p. 648.

uttered a warning against too liberal an application of the profits basis. " When profits are made the basis of assessment they should be considered at their lowest, and nothing should be included which can reasonably be excluded in both receipts and expenditure. Due allowance should be made for the change of personality in control, for the speculative character of the business, and for the fluctuating costs and difficulties of labour and material " (*j*). Whilst it is true that the majority of the court did not share the view of Cassels J. that too little regard had been paid to these matters by quarter sessions, it is submitted that the matters which he mentioned ought to be taken into consideration by a tribunal of fact when assessing annual value on a profits basis, for they are all matters which would be taken into consideration by a prospective tenant.

The decision in *Dodds* v. *South Shields* [1895] 2 Q.B. 135 should be noted in contrast to the above cases. The assessment committee desired to cross-examine as to the average weekly takings of a public-house in South Shields although there were other similar public-houses in the locality. The Court of Appeal held that such evidence was inadmissible, A. L. Smith L.J. saying (*k*) : " Where you have what Blackburn J. called the higgling of the market (*l*), where you have a market value whereby a comparison can be made, profit and loss in trade have nothing whatever to do with the ascertainment of the rateable value of the hereditament." The mere fact that the circumstances of the other public-houses in South Shields were not identical with those of the public-house to be assessed did not prevent a comparison from being made, nor render the particular hereditament sufficiently exceptional to admit evidence of profits.

If the annual rental value is properly assessed upon a profits basis, the amount of the profits is not to be cut down because by statute a part of them is appropriated to particular objects and to that extent the hypothetical tenant would not have a free choice as to the disposition of the profits (*ll*). Nor is the position different if the actual occupier has by private agreement undertaken to share the profits with some other person (*m*). As has already been seen, however, account must be taken of statutory restrictions which limit or prohibit the making of profits upon the hereditament (*mm*).

(*j*) At p. 656.
(*k*) At p. 139.
(*l*) See *Mersey Docks* v. *Liverpool* (1873) L.R. 9 Q.B. 84.
(*ll*) *Port of London Authority* v. *Orsett Union* [1920] A.C. 273.
(*m*) *R.* v. *Rhymney Ry.* (1869) L.R. 4 Q.B. 270; *Brecon Markets Co.* v. *St. Mary's Brecon* (1877) 36 L.T. 109.
(*mm*) *Ante*, p. 288; *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* [1895] A.C. 136.

Evidence of constructional cost and value

The valuer may be faced with the problem of assessing the annual value of a hereditament for which there exists no market and which is not normally occupied for purposes of financial profit. In such a case it is sometimes the practice to calculate the site cost and the constructional cost of the buildings and to regard the annual interest which such a capital sum, if invested, would produce as an indication of the annual value of the hereditament. This method of assessment is often known as " the contractors' basis." The justification for this practice is to be found in the judgment of Buckley L.J. in *Liverpool Corporation* v. *Chorley Union* [1912] 1 K.B. 270. The hereditament under consideration had been purchased by the Liverpool Corporation as a gathering ground for water. In considering the question of annual value Buckley L.J. said (*n*) : " If [the corporation] did not own this land, they might wish to rent it for the purposes for which they bought it. What would it be worth their while to pay as rent? It was worth their while to pay a sum whose annual value, had it been invested was so much. They have foregone that annual income as the price of having the land. Had they rented instead of buying, that annual sum is some evidence of the amount which it was worth their while annually to pay, in the absence of better evidence, the price paid is, I think, evidence to be regarded." Such a method of calculating annual value is only a rough method and has considerable limitations. " It is a test in some cases, but not in others. If the place is occupied by a tenant, it is not a good test at all, because the rent which he actually pays is a far better one. If the place is unlet, it is not at all a good test, because it may be that no tenant would give anything approaching to the interest on the cost. But if the place is occupied by the owner himself, then it is in some sense a test . . . . If he could get a place cheaper, at a less rent than the interest on the cost comes to, it is to be assumed he would not go to the expense of building, he would prefer to take the cheaper course and pay rent " (*nn*). If the occupying owner has actually incurred the cost of buying the site and of erecting the buildings which he needs, then no doubt it is true that interest upon such costs is some measure of the annual value of the land to him. It would not, however, be correct to take interest on costs extravagantly incurred by a previous owner as the annual value to the present owner (*o*). The price which he paid to buy the hereditament is a better indication of its capital value to him. Interest

(*n*) At p. 288.
(*nn*) *Per* Cave J., *R.* v. *School Board for London* (1885) 55 L.J.M.C. 33, 37.
(*o*) See *Liverpool Corporation* v. *Llanfyllin Assessment Committee* [1899] 2 Q.B. 14, *per* Vaughan Williams L.J. at pp. 22, 23.

upon cost can only be regarded as evidence of annual value if it can reasonably be supposed that the cost itself represents the capital value of the hereditament to the most likely hypothetical tenant. The most likely hypothetical tenant in the cases in which the contractors' basis has to be employed is usually the occupying owner, so that what usually has to be considered is the extent to which cost represents capital value to the owner of the hereditament. An illustration of this is provided by the case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* [1899] 2 Q.B. 14. The Liverpool Corporation were empowered by Act of Parliament to construct a reservoir and ancillary works. The construction of the works involved the submersion of certain buildings and the diversion of certain roads. The Act required the corporation to erect new buildings on other sites to replace those submerged and to make all necessary new roads. The corporation constructed the reservoir together with the new roads and buildings. Both parties to the appeal agreed that the capital value of the works ought to be considered, but the corporation contended that such capital cost ought to exclude the cost of the new buildings and roads which were not part of the hereditament itself. The Court of Appeal, however, rejected this contention, A. L. Smith L.J. saying (*p*) : " [The corporation] could not construct the works which they desired to construct . . . without coming under the obligation to provide a new church, vicarage and schools in lieu of paying a pecuniary compensation for those which would be destroyed by the works. I cannot see why as a matter of law that expenditure was not properly taken into account in arriving at the rateable value." If the corporation had purchased the reservoir completed it may well be that the costs of construction to the vendor would not have been a reliable guide of the capital value of the reservoir to the corporation. So also where the buildings comprised in a hereditament have become obsolete, it would be erroneous to take their constructional cost as the measure of their capital value to the hypothetical tenant.

In cases where the occupying owner is a local authority, the local authority has usually borrowed money to provide itself with the hereditament which is to be rated. It is common practice to regard the interest payable on this loan as prima facie evidence of the annual value of the hereditament, rather than to regard the interest which the capital sum would yield if invested as the measure of that value.

Valuation of public utility undertakings

Public utility undertakings, such as water and gas undertakings, present special problems of valuation. They commonly extend into

(*p*) At p. 22.

several rating areas, and in the days when the parish was still the basic rating unit the position was even more complex. "In these circumstances it was desirable in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking" (*q*). Accordingly, rating valuers evolved a basis of valuation based on the profits of the whole undertaking. This basis was approved judicially in *R.* v. *Mile End Old Town* (1847) 10 Q.B. 208, and has since become widely known as "the profits basis." In truth it is a valuation made partly with reference to profits and partly with reference to capital value. The classical description of the profits basis is contained in the judgment of Viscount Cave L.C. in *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331, at page 339. More recently it has been described by Jenkins L.J. as involving calculations of the following nature (*r*): "(a) The ascertainment of the net revenue produced by the whole undertaking which is treated as representing the net annual value of the entire concern and is commonly known as 'the cumulo value'; (b) a division of the hereditaments comprised in the whole undertaking between those directly productive of revenue and those only indirectly so productive; (c) the ascertainment of the net annual value of the indirectly productive hereditaments by the method commonly referred to as 'the contractors' basis,' that is to say, by estimating their respective capital values and taking an appropriate percentage thereon . . . as representing the net annual value of all the indirectly productive hereditaments of the undertaking; (d) the deduction of the last mentioned figure of net annual value from the cumulo value; (e) the apportionment to the indirectly productive hereditaments in each rating area of their individual net annual values as ascertained above; and (f) the allocation to the directly productive hereditaments in each rating area of their proper share of the balance of the cumulo value in proportion to the amounts of revenue arising in those areas."

The above is a general description of "the profits basis." It must, however, be remembered that it "is no more than an aid to the ascertainment of . . . rent in cases of a particular class. It lays down no inflexible code: the manner of applying its general principles no doubt admits of variation to suit the peculiarities

(*q*) *Per* Viscount Cave L.C., *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331, 338.

(*r*) *Metropolitan Water Board* v. *Borough of Hertford* [1953] 1 W.L.R. 620, 627.

of individual cases, and no doubt there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless 'the profits basis' has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may . . . be said that as a matter of law it is prima facie the right method to apply in . . . case[s] of this kind . . ." (*s*).

(*s*) *Ibid.*, *per* Jenkins L.J. at pp. 631, 632.

THE EFFECTS OF NOTICE ON CONTRACTS FOR THE SALE OF LAND

By R. Geoffrey Rowley, ll.d., Solicitor

In *Ogilvie* v. *Foljambe* (*a*), where it was first held that notice to an intending purchaser of a defect in title prior to the signature of a contract for sale precluded him from objecting to the title on that account, Sir William Grant M.R. advanced as an argument for the effectiveness of notice the circumstance that "Even in cases where there has been a covenant against incumbrances, it has sometimes been doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice." This view was briefly upheld in *Hunt* v. *White* (*b*) and finally discarded in *Page* v. *Midland Railway Co.* (*c*), which established that the generality of covenants for title in a conveyance cannot be restricted by showing that a defect was known to the purchaser.

The law as to the operation of notice of defects or incumbrances on executory contracts for the sale of land might have been expected to follow a parallel course; that it failed to do so is clear from the generally accepted statement of the present law on this subject: "Where the vendor's obligation to show a good title is not an express term of the contract, but is merely implied, as in the case of an open contract, it is open to him to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially; and the vendor will then be exonerated from showing title to the extent indicated by such notice. . . . But where the vendor has expressly contracted to show a good title, he is not permitted to modify the terms of his written agreement by giving oral evidence of any such notice" (*d*).

The object of this inquiry is to suggest that the law is still in an indeterminate and unsatisfactory state. One reason for this is that the historical peculiarities of real property law relating to forms of conveyance led to a comparatively late development of contracts for the sale of land, which have in some respect settled uneasily

(*a*) (1817) 3 Mer. 53.
(*b*) (1868) 37 L.J.Ch. 326.
(*c*) [1894] 1 Ch. 11.
(*d*) Williams' *Vendor and Purchaser*, 4th ed., p. 241, a passage expressly adopted by Cozens-Hardy M.R. and Warrington L.J. in *Alderdale Estate Co.* v. *McGrory* [1917] 1 Ch. 414.

into common law principles. Such contracts are hybrid creatures, born of an uneasy marriage of the law of property and the law of contract, and doubtful to which parent they owe their primary allegiance. The concept of "notice" affecting a contract for sale suggests to a conveyancer something analogous to the doctrine of notice of equities operating on the conscience of a purchaser. To a common lawyer, notice of a defect in title is merely evidence that the purchaser knew of the defect when he entered into the contract and that knowledge may or may not affect his contractual intent; but, in so far as evidence of notice is regarded as evidence of the respective states of mind of the contracting parties, it is prima facie excluded by the parol evidence rule. The attempts to resolve this dilemma and to establish the validity of notice reveal five distinct methods of approach, which it is proposed to consider and criticise in turn.

1. *The Equitable Analogy*

The confusion between property and contract appears nowhere more clearly than in the suggestion that notice to a contractual purchaser is a direct analogy with the doctrine of notice. This suggestion was adopted in *James* v. *Lichfield* (*e*), where it was held that the doctrine, that notice of a tenant's occupation is notice of his rights, applied as between vendor and purchaser whilst the matter still rested in contract; this unwarranted extension of the doctrine of notice was, however, soon repudiated in *Caballero* v. *Henty* (*f*), where James L.J. held that the decisions "apply only to certain equities between the purchaser and the tenant when the purchase has been completed, and have nothing to do with the rights and liabilities of the vendor and purchaser as between themselves" (*g*).

2. *Implied Terms and the Parol Evidence Rule*

The current view of the state of the law is that already quoted from *Williams*, and at its baldest the reasoning frequently adopted appears to take the form of a false syllogism with doubtful premises :

(a) Where there is an express stipulation for a good title, the parol evidence rule precludes the admission of parol evidence of notice;

(*e*) (1869) L.R. 9 Eq. 51.
(*f*) (1874) L.R. 9 Ch. 447.
(*g*) The same criticism may be applied to *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, where it was held that notice of registered land charges extended to a contractual purchaser by virtue of the L. P. A., 1925, s. 198, although the complementary section 199 (on the effects of non-registration) clearly applies only on the completion of the sale.

(b) The parol evidence rule does not apply to a right to title implied under an open contract;

(c) Therefore an implied right to title may be limited by notice.

This reasoning imports that, if only the parol evidence rule can be overcome, even express stipulations can be varied by notice (*h*) and, if *Re Forsey and Hollebone's Contract* (*i*) is correctly decided, this is in fact the case where notice can be proved by reference to the registration of a land charge under the Land Charges Act, 1925. The correctness of both premises—that notice is inoperative to limit an express right to title by reason only of the parol evidence rule, and that this rule is inapplicable to implied terms—is open to doubt. In *Cato* v. *Thompson* (*j*), the foundation of the modern restatement of the law on this subject, Jessel M.R. took the view that notice to a purchaser of restrictive covenants was overridden by the express term of the contract providing that the vendor would make a good marketable title, whilst Lindley L.J. thought that the notice was merely ignored by the blind eye of evidence, and did not consider the question of sanctity of the contract. The two lines of approach may well be cumulative, not contradictory; where evidence of notice is rejected, it is unnecessary to consider its effects, and it is dangerous to assume that notice would, apart from the parol evidence rule, be effective to subject a purchaser to defects or incumbrances, since this would be inconsistent with the contractual view as expressed by Jessel M.R.

The argument that implied terms can no more be varied by parol evidence than express terms is clearly and, it is submitted, convincingly set out in the judgment of Blackburn J. in *Burges* v. *Wickham* (*k*) where he concludes: "It seems to me plain on principle that every mischief arising from admitting parol evidence to vary a written contract arises equally, whether it is admitted to vary an express or an implied term of that contract." This objection is supported by such other authorities on the point as

(*h*) *Cf. May* v. *Platt* [1900] 1 Ch. 616, where the parol evidence rule was used to support the proposition that a purchaser's knowledge of a defect will not restrict the generality of the vendor's covenants for title, thus obscuring the wider principle that even documentary evidence cannot restrict the clear wording of the covenants: see *Page* v. *Midland Railway Co.* [1894] 1 Ch. 11, where notice, though proved by a recital in the conveyance, was still ineffective.

(*i*) [1927] 2 Ch. 379.

(*j*) (1882) 9 Q.B.D. 616. The express term, said Jessel M.R., comes to this: "I know there is a serious defect in your title, and I will buy if you can make it marketable." *Cf. Barnett* v. *Wheeler* (1841) 7 M. & W. 364 and the judgment of Fry J. in *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320.

(*k*) (1863) 3 B. & S. 669. Lord Cockburn C.J. delivered a contrary judgment in the same case, holding that "with reference to a term introduced into the contract from an assumed intention of the parties, evidence may be admitted of extrinsic facts to negative or qualify such intention." It is suggested that this opinion is not in accordance with the modern view that the material intention is ultimately that of the court.

are available (*l*), by textbook writers (*m*) and by the editors of Halsbury's *Laws of England* (*n*) who state the position as being that "Parol evidence is not only excluded as a general rule in reference to matters which are expressly dealt with by the written agreement, but also in reference to terms implied by law with regard to which the document is silent" and submit (in a footnote) that this statement is not impugned by the dictum in *McGrory* v. *Alderdale Estate Co.* (*o*), to the effect that the implied obligation to make a good title in an open contract may be rebutted by evidence of notice, as "the judgments in this case were directed to the consideration of whether there was waiver" (*p*).

3. *Implied Terms and Rules of Law*

In only two cases has a right to title under an open contract been held to be limited by previous notice to a purchaser—by the Court of Appeal in *Alderdale Estate Co.* v. *McGrory*, where the objection that parol evidence should not be permitted to vary an implied contract was apparently neither raised nor considered, and a century earlier in *Ogilvie* v. *Foljambe* (*q*) by Sir William Grant M.R., who begins by conceding the serious effects of the parol evidence rule, and endeavours to evade them by denying that the right to a good title is a contractual term at all: "But here the controversy between the parties is altogether collateral to the agreement. No term in the written agreement is sought to be varied or added to. The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and conclude the agreement after he had full notice that he was not to expect it." In his efforts to uphold the

(*l*) *Moseley* v. *Hanford* (1830) 5 Man. & Ry. K.B. 607 (promissory note); *Fawkes* v. *Lamb* (1862) 8 Jur.(N.S.) 385 (trade customs); *Evans* v. *Roe* (1872) L.R. 7 C.P. 128.

(*m*) Benjamin on *Sale*, 7th ed., p. 239; Arnould on *Marine Insurance*, 11th ed., pp. 907–9.

(*n*) Hailsham ed., Vol. VII, p. 337.

(*o*) [1918] A.C. 503.

(*p*) The actual House of Lords decision was that evidence in rebuttal of the right to title must be adduced on the hearing of the application for specific performance and cannot be admitted later; the observations of Lord Finlay L.C. may therefore be called a "dictum" but the Court of Appeal decision amounted to an express decision that parol evidence of notice was admissible to rebut an implied right to title. The existence of waiver was not considered on either hearing.

(*q*) (1817) 3 Mer. 53, "that remarkable judgment which cannot be too frequently referred to by gentlemen desirous of acquainting themselves with this branch of the law"—*per* Malins V.-C. in *M'Murray* v. *Spicer* (1868) L.R. 5 Eq. 527.

efficacy of notice, and yet to disestablish it from the principles of contract, Grant M.R. draws an unfortunate analogy, that "the exemption of common carriers from their legal liability is effected by notice, without any express contract" although it had already been held (*r*) that "the question in these cases always is, whether the delivery was upon a special contract."

The nature of the right to title under an open contract does not seem to have been judically considered since *Ogilvie* v. *Foljambe*, and Lord St. Leonards (*s*) impartially expresses both views, first that "In contracts for the sale of real estate an agreement to make a good title is always implied, unless the liability is expressly excluded" (*t*) and secondly, that "the right to a good title is a right not growing out of the agreement, but which is given by the law" (*u*). In 1885 Cotton L.J. mentioned the two views, observing that "it might under some circumstances have been necessary for us to decide on which of these two grounds the right to a good title rests, whether it depends on an implied term in the contract or is a collateral right given by the law" (*v*).

It is submitted that the necessity for decision no longer exists, since in view of recent authorities the validity of the distinction between legal rights and implied terms is now open to question. The actual intentions of the parties have been held to be irrelevant; the court personifies a hypothetical "reasonable man" and Dr. Glanville Williams (*w*) has concluded that it is now a matter of taste whether implied terms be styled implied terms or rules of law. The conclusion seems logically inescapable, that the ingenious distinction between a right "growing out of the agreement" and a right "given by law" resolves itself into a mere matter of terminology, and the House of Lords decision in *McGrory* v. *Alderdale Estate Co.*, *supra*, that the right to title must be limited, if at all, on the hearing when specific performance is sought and cannot be limited by evidence of notice adduced on a reference to title,

(*r*) *Leeson* v. *Holt* (1816) 1 Stark. 186; see also the Carriers Act, 1830, s. 4, which, taken in conjunction with s. 6, appears to be declaratory of the previous state of the law.

(*s*) Sugden, *Vendor and Purchaser*, 14th ed., pp. 16, 337.

(*t*) *Souter* v. *Drake* (1834) 5 B. & Ad. 992.

(*u*) Lord St. Leonards erroneously attributes this view to *Hall* v. *Betty* (1842) 4 Man. & G. 410 where *Souter* v. *Drake*, *supra*, was approved.

(*v*) *Ellis* v. *Rogers* (1885) 29 Ch.D. 661. It is doubtful whether the expression "a collateral right given by the law" can legitimately claim its parenthood in the observation of Grant M.R. that the controversy was collateral to the agreement: see the observations of Denman C.J. in *Goss* v. *Nugent* (1833) 5 B. & Ad. 58: "As to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all."

(*w*) In his illuminating series of articles "Language and the Law" (1945) 61 L.Q.R., at p. 404; see also *Fibrosa Spolka, etc.* v. *Fairbairn Combe Harbour, Ltd.* [1943] A.C. 32; *I.R.C.* v. *Raphael* [1935] A.C. 96.

indicates that notice affects a specific contract and not any general rule of law operating *in vacuo*, and disposes of any suggestion that the right to title is analogous to the warranty "free from incumbrances" implied by the Sale of Goods Act, 1893 (*x*).

4. *Subject-matter of the Contract*

A further loophole in the parol evidence rule is by means of evidence as to the subject-matter of the contract, which has been frequently established to identify the physical property sold (*y*). Some efforts have been made to extend this to tenure, relying on the fact that the right to title varies with the interest contracted to be sold (*z*), and the final step would be that as the subject-matter of the contract is not a physical property, but the vendor's interest therein, the admission of evidence of defects or incumbrances is necessary to the ascertainment of this interest.

Suggestions of this attitude are to be found in *Alderdale Estate Co.* v. *McGrory*, where Lord Cozens-Hardy M.R. cites authorities to the effect that "although you cannot give evidence to contradict an express term of the contract, you may give evidence to explain what it was the parties were really contracting about" (*a*). The extension of the "subject-matter" complex to its illogical conclusion is illustrated in *Fowler* v. *Willis* (*b*) where a lessee on exercising an option to purchase "all the estate interest and title which is at the date of these presents vested in the landlords" was held to take subject to a mortgage created before the lease but first disclosed on the abstract of title.

The reported cases on the limitation of the right to title are not, however, with this exception, founded on any extension of the exception allowing parol evidence as to subject-matter. Two factors militate against the adoption of this approach: that it fails to

(*x*) s. 12 (3): "That the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made." It should be noted that the statutorily implied covenants for title on the sale of land are not similarly limited.

(*y*) In *Ogilvie* v. *Foljambe*, for example, "Mr. Ogilvie's house" was held sufficient identification.

(*z*) "When the stipulations in a contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent of the obligation cast upon the party may vary greatly, according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract"—*per* Blackburn J. in *Burges* v. *Wickham* (1863) 3 B. & S. 669; see also the speech of Lord Wright in *I. R. C.* v. *Raphael* [1935] A.C. 96.

(*a*) Jessel M.R. and Lindley L.J. in *Cato* v. *Thompson* are the authorities cited but they are not reported to this effect. It also appears that counsel for the purchasers conceded in the House of Lords that evidence may be admitted to identify the nature of any qualification of the title which both parties had in their minds.

(*b*) [1922] 2 Ch. 514. It seems that this decision is insupportable—see the directly contrary case of *Goold* v. *Birmingham Bank* (1888) 58 L.T. 560.

distinguish between removable and irremovable defects, and that it draws no distinction in construction between implied and express terms—indeed, an express right to title would be construed in relation to the subject-matter as identified by parol evidence to the same extent as an implied term.

5. Notice and Misrepresentation

Where a vendor is charged with misrepresenting the state of the property, it is clearly an answer for him to prove that the purchaser had notice of the inaccuracy of the representation before entering into the contract, and did not therefore contract on the faith of the false representation (*c*). Notice in this connection will prevent a purchaser from rescinding a contract on the grounds of misdescription and, it is said, on this account notice indirectly limits the right to title.

On the issue of misrepresentation the effects of notice are limited to the existence or otherwise of a valid contract : misrepresentation avoids a contract *ab initio*, and all its terms, including any express or implied right to a good title. But it is an undue extension to apply similar effects to notice once its validity is established (*d*).

Conclusion

For the most part the cases do not pursue these various methods of approach with any detailed consideration of their intrinsic defects; rather do they confuse the alleged effects of notice—to rebut or waive a right to title, to fix a purchaser with notice of equities, to show that a misrepresentation was not acted upon, or to prove that the parties were *ad idem*.

To summarise the history of the problem, Sir William Grant's theory was that the right to title was not an implied term of the contract but a general right conferred by law, and could thus be varied without infringing the parol evidence rule. This view of the law remained an historical curiosity, and the fundamental right to a good title suffered an astonishing metamorphosis into a collateral right, when the later cases accepted the " implied term " theory of the right to title. The shift of emphasis to implied terms necessitated a new method of approach, that notice could not contradict a contractual stipulation as to title, but this was almost

(*c*) *Attwood* v. *Small* (1838) 6 Ch. & Fin. 232; *Redgrave* v. *Hurd* (1881) 20 Ch.D. 1.

(*d*) As seems to have happened in *Cato* v. *Thompson*, where Jessel M.R. distinguished three cases dealing with misrepresentation, where notice had been effective, on the ground that they did not concern contracts with an express term for a good contract, so giving rise to the whole distinction between express and implied terms as to title.

immediately obscured in the fog which accompanied the introduction of the parol evidence rule as an alternative (though less complete) explanation of the ineffectiveness of notice. The law of contract became swamped by the law of evidence, until it came to be accepted that the parol evidence rule was the only objection to the effectiveness of notice and, as a further complication, whilst it was conceded that parol evidence could not vary an express right to title, somewhat illogically the principle was not extended to cover implied terms, although the implication, whilst ostensibly based on intention, in fact depends on an intent assumed by the court, adopting the role of the "reasonable man" and ignoring the vagaries of the actual intentions of the parties. The distinction between express and implied terms originated in the judgment of Jessel M.R. in *Cato* v. *Thompson*, in an effort to explain the effectiveness of notice in misrepresentation cases; and the distinction between removable and irremovable incumbrances, which nowhere appears in *Cato* v. *Thompson* (*e*), was lifted bodily from the consideration of this question, on the issue of waiver after contract, in *Re Gloag and Miller's Contract* (*f*) and the resulting amalgam appears in *Ellis* v. *Rogers* (*g*) and was approved in *McGrory* v. *Alderdale Estate Co.*

It is submitted that the law as to the modern doctrine of notice can by no means be regarded as settled. Until 1917 there were only dicta to support the present restatement of the law, and the unsatisfactory decision in *Re Highett and Bird's Contract* (*h*) to oppose it. The Court of Appeal decision in *Alderdale Estate Co.* v. *McGrory* is the only authority directly supporting it, and even this was held by the House of Lords to be based on a wrong view of the facts.

In the light of the whole of the cases, the most satisfactory solution appears to be to hold that notice is not of itself effective to limit a right to title, and that notice before the contract operates in the same way as notice after the contract, by way of a contractual

(*e*) Indeed, Jessel M.R. uses the example of a purchaser buying property which is subject to a mortgage of which he knows, to illustrate the general ineffectiveness of notice.

(*f*) (1883) 23 Ch.D. 320.

(*g*) (1885) 29 Ch.D. 661.

(*h*) [1902] 2 Ch. 214; affd. [1903] 1 Ch. 287, where it was held that notice, that a leasehold title was bad by reason of a breach of covenant, did not remove the obligation to make a good title under an open contract. Romer L.J., in *Re Allen and Driscoll's Contract* [1904] 2 Ch. 226, stated that *Highett's* case was decided on the footing that there was an express agreement for a good title, but this explanation is not entirely satisfactory, since a further point in the case depended on the fact that there was an open contract, importing s. 3 (4) of the Conveyancing Act, 1881, and both Swinfen Eady J. and Collins M.R. mention the open contract in their judgments.

provision (*i*). On this view neither the parol evidence rule nor the Statute of Frauds need work an injustice on the vendor, since notice, coupled with a course of conduct on the part of the purchaser, may lead to the conclusion that the right to title has been waived; the parol evidence rule does not prevent evidence of subsequent waiver, and part performance may be invoked to meet any objection under the Statute of Frauds. Alternatively, if it is alleged that the written contract does not accurately reflect the terms of agreement between the parties, the omission can be supplied by asking for rectification and specific performance of the contract as rectified. Such a solution would at least avoid the curious picture of the law presented by contrasting the decision in *Hussey* v. *Horne-Payne* (*j*), that an offer to sell which is accepted " subject to a good title being made " constitutes a binding contract, because no new term is involved, with the decision in *Keen* v. *Mear* (*k*) where it was held that an estate agent has no authority to contract on behalf of his principal that " a good title shall be given " since (on the authority of *Alderdale Estate Co.* v. *McGrory*) this term might be less favourable to the vendor than the implied term under an open contract.

(*i*) Lord Finlay L.J. in *McGrory* v. *Alderdale Estate Co.* observed that, in connection with notice, " every reason given for the decisions as to waiver after contract applies *a fortiori* to a case where the vendor seeks to modify the contract by proof of knowledge at the time of the contract." As to the effects of the parol evidence rule and the Statute of Frauds on post-contractual waiver, see *Goss* v. *Nugent* (1833) 5 B. & Ad. 58.

(*j*) (1879) 4 App.Cas. 311; see also *Hawkins* v. *Price* [1947] Ch. 645, where Evershed J. states that a memorandum under the Statute of Frauds need not refer to implied terms, such as that the vendor should make a good title.

(*k*) [1920] 2 Ch. 574.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor *

Re Greaves, Public Trustee v. *Ash* [1954] 2 W.L.R. 557; [1954] 1 All E.R. 771 (C.A.)

Power of appointment—doctrine of fraud on power—whether applicable to revocation—revocation followed by release—benefit to appointor.—In this case at first instance (noted *ante*, p. 79, where the facts are set out) Vaisey J. held that the revocation of an appointment can be impeached as a fraud on the power and that on the facts there was a fraud—in the technical sense. The Court of Appeal has now reversed the decision on the first point, and, overruling *Re Jones' Settlement* [1915] 1 Ch. 37, has held that normally (see last paragraph of this note) the doctrine of fraud upon a power does not apply to the revocation of an appointment, even if followed by a release involving benefit to the appointor. On the second point, had it arisen, the learned Lord Justices would have agreed with Vaisey J.

The single reserved judgment, which was read by the Master of the Rolls, rested on three principal points: (1) The essential quality of the vice constituting a fraud on a power is that the appointor, having assumed the burden of making an appointment, has made it not with the single view of conferring benefits among the designated class, but with the purpose of procuring a benefit for a non-object (*Vatcher* v. *Paull* [1915] A.C. 372). The fraud consists of divesting the interests of the person entitled in default of appointment "otherwise than for the purposes and in the way limited by the donor of the power" (2 W.L.R. at p. 562). (2) The doctrine of fraud on a power cannot therefore apply to a release of a power, for "the limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power"—*per* Lord Parker of Waddington in *Vatcher* v. *Paull, supra,* at p. 379. Prima facie the same reasoning should apply to the revocation of an appointment, for by reserving the right to revoke the donee has preserved to himself a *locus poenitentiae.* (3) There is no validity in the argument that once a power is exercised a duty does arise. Since the only duty is not to *exercise* the power "otherwise than for the single benefit of the members of the designated class of object" (2 W.L.R. at p. 565) no duty not to revoke or release can be owed to the existing appointees, to the whole class of possible appointees, or to the persons entitled in default. Being free to revoke or not as

* We regret that Professor Crane was inadvertently described as "Barrister-at-Law" in our last issue.

he pleases, the donee may stipulate for a benefit to himself or a third party as a condition of revocation.

This is one of the matters in which certainty in the law is the primary requirement, so that the conveyancer may know the capabilities of the tools at his disposal. It is therefore satisfactory to have a single emphatic judgment from the Court of Appeal. Nevertheless the unsuccessful argument has its attractions. As Romer L.J. said in *Re Mills* [1930] 1 Ch. 654, at p. 670, a testator " hopes and intends that the donee of the power will, when the time comes, carefully and wisely select which of the class indicated should succeed." If the donee has decided upon a proper and non-fraudulent appointment because it is desirable to vary the interests limited in default of appointment, there is some force in the proposition that he should not be able to resile from this view for reasons not contemplated by the donor. The Court of Appeal's decisive rejection of this argument seems both to stem from, and to underline, the rigid distinction between a trust, enforceable by the court, and a mere power, which the donee is free to exercise or release at pleasure (see Law of Property Act, 1925, ss. 155, 156; *Re Somes* [1896] 1 Ch. 250). In *Re Mills, supra*, where the reasoning is similar to that in the instant case, Romer L.J. followed the passage cited above by saying " But in such a case it has been held over and over again that the power is not a power in the nature of a trust or coupled with a duty." The distinction also leads to the rule, recently illustrated, that while the objects of a trust must be ascertainable those of a mere power may be uncertain (*I. R. C.* v. *Broadway Cottages Trust* [1954] 1 W.L.R. 659 (*infra*); *Re Gestetner's Settlement* [1953] Ch. 672).

In the present case the Master of the Rolls concluded by confining the judgment to the facts or circumstances strictly analogous, stating that powers of revocation and reappointment might be so strictly coupled that, as a matter of construction, revocation could be only a step to reappointment; if the latter were invalid it might also taint the former. Thus the doctrine of dependent relative revocation may not be confined to wills.

Wright v. *Pepin* [1954] 1 W.L.R. 635; [1954] 2 All E.R. 52 (Ch.D.)

Limitation of action—mortgagor and mortgagee—acknowledgment —solicitors' authority to bind client.—If a mortgagor ceases to pay interest the mortgagee's right will be barred after 12 years, unless his title is acknowledged in writing by the mortgagor or his agent, when time begins to run afresh (Limitation Act, 1939, ss. 4, 23, 24). The present case illustrates the practical difficulties which may spring from these elementary propositions, and the dangers of entering into any negotiations if it desired to rely upon the statute.

Mortgaged premises having been bombed in 1940, no interest was paid after August 1 that year. The mortgagee's solicitors also acted for the mortgagor until 1947, when the latter consulted a new solicitor, who wrote for accounts, mentioning the existence of mortgages. Subsequently the mortgagee's solicitors began to write, in that capacity, pressing for information about rebuilding—because the local authority

were enquiring. Eventually in 1950 the mortgagor's solicitor wrote "[the mortgagor] will shortly be making an appointment to see you with regard to her accounts with you for some time past . . . steps are being taken to rebuild [the property] . . . as soon as the work is in hand I will let you know, when [the mortgagor's] position can again be reviewed." Harman J. held (i) mere demanding of accounts from a client's former solicitor was no acknowledgment; (ii) the letter quoted, written to solicitors by then clearly corresponding as mortgagee's solicitors, did amount to an acknowledgment; and (iii) the client's general instructions "to put her affairs in order" authorised the solicitor to give an acknowledgment. Consequently the mortgagee's rights were not statute-barred.

Lloyds Bank Ltd. v. *Margolis* [1954] 1 W.L.R. 644; [1954] 1 All E.R. 734 (Ch.D.)

Limitation of action—legal charge to secure overdraft—whether demand necessary—enforcement of security.—A customer created a legal charge to secure advances by the Bank in September, 1936. In October, 1938, the Bank froze the overdraft and in December, 1938, demanded repayment. In November, 1950, the Bank began proceedings for foreclosure or sale. These facts raised very neatly the question of the date at which the cause of action arose for the purposes of the Limitation Act, 1939, s. 4.

Upjohn J. held, first, that as a matter of construction the covenants in the legal charge to pay "on demand" concluded the matter in favour of the Bank. A similar principle is applied in cases involving guarantees by third parties, *e.g.*, *Wright* v. *New Zealand Farmers Co-operative Association* [1939] A.C. 439. The learned judge also described the facts as "nearly correlative" to *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110, deciding that a customer must demand payment from a bank to give rise to a cause of action. However, the reverse proposition does not appear to apply—"a bank cannot recover a dormant overdaft more than six years after the last advance" (Preston and Newsom, *Limitation of Actions*, 2nd ed., at p. 27, citing *Parr's Banking Co., Ltd.* v. *Yates* [1898] 2 Q.B. 461.) It is therefore submitted, with respect, that the present decision does not go beyond the question of construction.

Upjohn J. also held the charge to be a collateral security, citing remarks by Denning L.J. in *Barclays Bank Ltd.* v. *Beck* [1952] 1 T.L.R. 595, that advances on running account are not created under the charge, though they might not be given but for the charge. Consequently he applied the rule that demand must be made before a collateral security is enforced, following *Re Brown's Estate* [1893] 2 Ch. 300. It may be noted that in *Barclays Bank* v. *Beck, supra,* the decision was that the simple contract debt created by an overdraft was not merged in a subsequent charge. On this basis it might be possible to argue that the principal debt is extinguished after six years and therefore the collateral security becomes unenforceable. There may be some difficulty in applying rules adumbrated concerning

guarantees by third parties to cases where the actual debtor provides security.

Church of England Building Society v. *Piskor* [1954] 2 W.L.R. 952; [1954] 2 All E.R. 85 (C.A.)

Mortgage—excluding power of leasing—tenancies created by prospective purchaser—purchase and mortgage completed together—feeding the estoppel—whether mortgagees bound by tenancies.—If A, a prospective purchaser of the fee simple in Blackacre, being in possession before completion, purports to create a tenancy in favour of B then, on completion of the purchase the estoppel is "fed" and B acquires a legal term of years. Such a term is obviously binding on any subsequent mortgagee. Difficulties have arisen where A finances his purchase by a mortgage which excludes the power of leasing. Prior to the instant decision the law could be stated as follows:—The mortgagee could show that purchase and mortgage were in fact one transaction, with no *scintilla temporis* between them to enable the estoppel to be fed (*Coventry Permanent Economic Bldg. Socy.* v. *Jones* [1951] 1 All E.R. 901). In this event the mortgagee could eject the tenant (*Dudley & District Bldg. Socy.* v. *Emerson* [1949] Ch. 707), unless (i) the tenancy was registered as an estate contract under the Land Charges Act, 1925, (*Coventry* case, *supra*), or (ii) the title was registered under the Land Registration Act, 1925, and the tenant in occupation so as to have an overriding interest under section 70 (1) (g) of the Act (*Woolwich Equitable Bldg. Socy.* v. *Marshall* [1952] Ch. 1; *Mornington Permanent Bldg. Society* v. *Kenway* [1953] 2 W.L.R. 859; *City Permanent Bldg. Socy.* v. *Miller* [1952] Ch. 840). However, lack of cogent evidence of the absence of any *scintilla temporis,* or a difference in date between conveyance and mortgage, or a recital in the mortgage of the mortgagor's estate ownership, is fatal to the mortgagee's case (*Universal Permanent Bldg. Socy.* v. *Cooke* [1952] Ch. 95; *Woolwich* case, *supra*).

In the present case (in which leave to appeal to House of Lords was given) the Court of Appeal, while agreeing that a recital in the mortgage of estate ownership was fatal to the mortgagee, also disapproved the *Coventry* case, unless distinguishable as a case of fraud by tenants and purchaser combined. The Master of the Rolls said that although the transaction of purchase and mortgage might "fairly be said to be one in substance . . . it necessarily consists of certain defined steps which must take place in a defined order if the result intended is eventually to be achieved. That seems to me not an artificiality, but a necessary result of the law and of the conveyancing practice which was involved" (2 W.L.R. at p. 957). He added that he doubted, and that authority had not been cited to support, Harman J.'s view (in the *Coventry* case), that no estate passed to mortgagor or mortgagee till the purchase-money reached the vendor. Romer L.J. said (2 W.L.R. at p. 960): "The mortgage of the purchased property cannot have any operation in law . . . unless and until the purchaser is in a position to vest a legal term in the property, as security in the

mortgagee, and he is not and cannot be in a position to do this until he himself has acquired from the vendor the legal estate out of which the mortgage term is capable of being created. From this it follows that the execution and delivery of the conveyance . . . by the vendor to the purchaser must of necessity constitute an essential preliminary to the vesting of the mortgagee of a subsidiary interest in the property."

If, and in so far as, the Court of Appeal was relying on the physical steps which occur at a completion there is, with respect, some difficulty in reconciling the analysis with the authorities on escrows, which were not considered. The latter establish, it is submitted, that in the normal case no estate passes till the money is paid. In *Walker* v. *Ware, etc., Rly.* (1865) 35 Beav. 52, Sir John Romilly said (at p. 58): ". . . I am of opinion that the purchaser has no estate till he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow." (See also, *e.g., Lloyds Bank* v. *Bullock* [1896] 2 Ch. 192; *Watkins* v. *Nash* (1875) L.R. 20 Eq. 252; *London Freehold and Leasehold Ppty. Co.* v. *Suffield* [1897] 2 Ch. 608; the last two cases indicate that there may even be delivery as an escrow to the actual grantee or his agent, though this is not certain). In *Thompson* v. *McCullough* [1947] K.B. 447, Morton L.J. (as he then was) said: " The normal thing would have been for the solicitor acting for both parties to retain the deed until the balance of the purchase price was paid, and for the deed to have been effectively delivered so as to pass the property to the purchaser when that happened." On the normal three-cornered completion the mortgagee pays the money direct to the vendor at the request of the purchaser; that payment, it is submitted, converts both conveyance and mortgage from escrows to effectual deeds. No actual *scintilla temporis* between the two exists—no film of completion could be stopped, it is submitted, at a moment when the conveyance is effective but the mortgage is not. The doctrine that the final delivery of an escrow dates back to the physical execution would seem to be excluded because of the extreme complication that would be caused (compare the reasoning of Morton L.J. in *Thompson* v. *McCullough* [1947] K.B. at p. 454). It is therefore submitted that the decision in the present case must rest on a technical rule of law necessitated by the doctrine of estates, as indicated in the quotation above from Romer L.J. This conclusion is logical and in many ways attractive, but seems to raise further problems if the vendor reserves easements or profits à prendre, which technically take effect as re-grants by the purchaser (*Wickham* v. *Hawker* (1840) 7 M. & W. 63); the rule even applies to a way of necessity implied by law (*London Corporation* v. *Riggs* (1880) 13 Ch.D. 798). It is suggested that here the courts might well regard the estoppel as being fed only by that which the purchaser has in fact bought—the fee simple subject to the easement or profit.

What steps should now be taken by mortgagees? Probably the only really practical course is enquiry of the mortgagor, making sure that the point is fully understood by him and, if thought fit, taking a statutory declaration that there are no tenancies. Deliberate fraud may not be prevented by this method. Actual inspection of the

premises contemporaneously with completion would be effective, but often difficult. A binding contract to create a mortgage, registered under the Land Charges Act, 1925, as an estate contract, would appear to achieve priority (assuming the tenancies were not similarly protected at an earlier time); so would such a contract protected on the register under the Land Registration Act, 1925, provided it preceded the creation of the tenancies as overriding interests. Here, again, contracts for mortgages are not normal and would deprive the mortgagee of his usual freedom of action.

Re Rayleigh Weir Stadium [1954] 1 W.L.R. 786; [1954] 2 All E.R. 283 (Ch.D.)

Trust for sale—partnership property—purchase of share—whether registrable as land charge.—M, estate owner in fee simple of the Stadium, entered into partnership with R, but there was no conveyance of the legal estate. Subsequently the respondent purchased " a one-eighth share of the freehold property called the Rayleigh Weir Stadium, etc."—the only evidence being a lost receipt. He registered both an estate contract and a general equitable charge, under the Land Charges Act, 1925, in respect of this purchase and the trustee in bankruptcy of M and R now asked that these entries should be vacated.

Harman J. held, first, that on creation of the partnership M became trustee of the legal estate for himself and R in equal shares (*cf.* the Partnership Act, 1890 s. 21), and second, that, since an undivided share cannot subsist at law, M held on trust for sale. This decision fills an apparent gap in the 1925 legislation, for section 34 of the Law of Property Act, 1925, is concerned with conveyances to persons in undivided shares. It accords with the view expressed by the learned editors of Halsbury's *Laws of England* (2nd ed., Vol. XXVII, p. 757, note (*k*), and compare *Re Fullers Contract* [1933] Ch. 652). Harman J. also suggested, as seems inevitably to follow, that the sole owner could make a good title to a bona fide purchaser for value without notice. The respondent had purchased a one-eighth share of the partners' interest—that is, of the proceeds of sale. Therefore the decision in *Rose* v. *Watson* (1864) 10 H.L.Cas. 672, that payment without conveyance creates a charge on land, was irrelevant.

Having reached this conclusion, the learned judge had no difficulty in finding that the respondent's interest was neither an estate contract, not being a contract to create a legal estate (L.C.A., 1925, s. 10 (1) Class C (iv)), or a general equitable charge, since this does not apply to interests arising under trusts for sale (L.C.A., 1925, s. 10 (1), Class (iii)). This distinction between the land and the proceeds of sale is in line with that made in *Stevens* v. *Hutchinson* [1953] 1 Ch. 299, where a receiver by way of equitable execution of the interest of a tenant in common was held not to have any charge on the land, and therefore not to be a person " interested " so as to be able to ask for a sale of the land under the Law of Property Act, 1925, s. 30.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Chapman v. *Chapman* [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798 (H.L.)

Trusts—modification of beneficial interests—extent of inherent jurisdiction of court.—The House of Lords though affirming the actual decision in *Re Chapman's Settlement Trusts* [1953] Ch. 218 (noted *ante*, Vol. 17, p. 83), has done so on the ground that the Court of Appeal was in error in asserting inherent jurisdiction to approve "compromises in a broad sense." Consequently the decisions in *Re Downshire Settled Estates* and *Re Blackwell's Settled Estates*, reported and noted with *Chapman* were disapproved, though there was no appeal in those cases. The judgments of the Lord Chancellor, Lord Morton of Henryton (with whom Lord Oaksey concurred), and Lord Asquith of Bishopstone appear to establish the following principles:

(1) The general rule is that the function of the courts is to execute trusts as declared by the settlor.

(2) There is no jurisdiction to modify trusts merely because (a) all *sui juris* beneficiaries so desire and (b) the modification would be for the benefit of other actual or prospective beneficiaries. (On this point there was no difference between the House and the Court of Appeal).

(3) There are four exceptions to the general rule. The courts have jurisdiction (a) to alter the nature of an infant's or lunatic's property by allowing investment of personalty in realty; (b) to permit trustees to enter into business arrangements of a "salvage" nature to preserve the trust property, as in *Re New* [1901] 2 Ch. 534 (authority to concur in reconstruction of a company); (c) to allow maintenance out of income directed to be accumulated—this rests on the supposition that the testator or settlor did not intend that beneficiaries should be unprovided for, or should not be educated for "the position and fortune which he designs them to have" (*Re Collins* (1886) 32 Ch.D. 229), and was said in the instant case to be the only true exception to the general rule; (d) to approve a compromise only *where rights are in dispute*. The court, said Lord Morton, is not altering the trusts, for the trusts are, ex hypothesi, still in doubt and unascertained" (2 W.L.R. at p. 740). *Re Trenchard* [1902] 1 Ch. 378, is either distinguishable or was an unduly extensive use of the jurisdiction.

Lord Cohen, who agreed with the majority of the Court of Appeal for their reasons, pointed out that any compromise does vary rights, because even where there is a real dispute the rights are those conferred by the true construction of the instrument. Moreover, he thought *Re Trenchard, supra*, should not be overruled after fifty years. A further objection to the majority view is that, like a "quasi-compromise," a "genuine dispute" is an uncertain quantity. Presumably it includes at least a situation where there would have

to be construction by the court even if no question of relief from death duties arose. In that case the inefficient draftsman may appear the beneficiaries' friend!

Though there is much force in the warning given by Lord Morton of the dangers of a contest over taxation between courts and legislature, the present decision may seem to bear hardly on beneficiaries, especially infants. Nevertheless, it is a long-standing principle of English law to permit men to control the disposition of their property through settlements and wills, subject only to broad restrictions imposed by rules such as those against perpetuity and alienability. (The right of beneficiaries, if all *sui juris* and together absolutely entitled, to determine the trust, seems to be an aspect of the latter rule). The wide jurisdiction to alter trusts, rejected by all the courts, and the power to approve "quasi-compromises" would both have transferred a large measure of control to a combination of the beneficiaries *sui juris* and the court—from the dead to the living. The merits of such a development are disputable, but there is perhaps something to be said for the view that jurisdiction should not depend on the accidents of drafting, as happened in the present cases in the Court of Appeal.

Inland Revenue Commissioners v. *Broadway Cottages Trust. Same* v. *Sunnylands Trust* [1954] 1 W.L.R. 659; [1954] 1 All E.R. 878 (Ch.D.)

Trust to distribute income—uncertain class of beneficiaries—invalidity.—The present decision illustrates and resolves some of the problems raised by the modern tendency, brought about by the incidence of income tax and death duties, to create wide discretionary trusts or powers instead of limiting successive defined beneficial interests.

A settlor in 1950 gave £80,000 to trustees upon trusts to distribute income at their discretion, and eventually capital in equal shares, among certain "beneficiaries." The latter, defined in a schedule, included past and present employees of certain persons and companies, spouses and issue of various named relatives, godchildren and charities. The trustees allocated some income to charities, whose claim for repayment of tax was rejected, the Inland Revenue Commissioners asserting that the trust was void.

It was common ground that the class of beneficiaries was unascertainable at any given moment and that the trusts of capital were therefore void for uncertainty. Wynn-Parry J. held, following *Re Ogden* [1933] Ch. 678, that the trusts of income were also void, because there being (on construction) an imperative trust to distribute all the income, it was necessary that the whole of the objects be ascertainable. The learned judge distinguished, first, *Re Gestetner* [1953] Ch. 672, agreeing with Harman J.'s view there that a mere power requires only that some of the objects be ascertainable, and second, the cases concerning gifts to "relations," holding that these were examples of powers (*e.g., Re Scarisbrook* [1951] Ch. 622, where the authorities are reviewed).

Three comments may be made:—

(1) the requirement of certainty cannot prevent the class from fluctuating, provided that at any one moment the persons comprising it are ascertainable were it otherwise not only the ordinary discretionary trust, but the protective trusts of section 33 of the Trustee Act, 1925, would be impugned, for unborn children and issue are normal objects of such trusts;

(2) gifts to "relations" may be charitable and then of course certainty is not required (*e.g., Re Scarisbrook, supra*);

(3) "where there is a power to appoint among a class, there will prima facie be implied a gift over in default of appointment to all the members of the class in equal shares . . . where the class is that of the 'relations of A' then the gift over will be limited to the statutory next-of-kin of A, since otherwise the uncertainty of the class would render such a gift void" (*per* Evershed M.R. in *Re Scarisbrook, supra* [1951] Ch. at pp. 635–6; see also *Wilson* v. *Duguid* (1883) 24 Ch.D. 244; *Grant* v. *Lynam* (1828) 4 Russ. 292). No such benevolent construction could be applied where the class is heterogenous, as in the present case; in *Re Gestetner, supra,* there was an express gift in default of appointment.

Innes (*Inspector of Taxes*) v. *Harrison* [1954] 1 W.L.R. 668; [1954] 1 All E.R. 884 (Ch.D.)

Rule against perpetuities — discretionary trusts — duration — divisibility of trusts.—This case, though covered by the judgment in *I. R. C.* v. *Broadway Colleges Trust* [1954] 1 W. L. R. 898 (noted *supra*), has been reported on a point of perpetuity, thereby illustrating a further pitfall for the draftsman of discretionary trusts.

A settlor covenanted to pay to trustees during an "appointed period" (April 6, 1949—March 31, 1959, or his life, if shorter, the monthly sum of £166-odd; the trustees were to pay or apply the trust fund to or for the benefit of the objects of the trust "at such times as . . . the trustees in their discretion shall from time to time think fit." Wynn-Parry J. held the trust void for perpetuity (so that beneficiaries actually paid could not claim tax reliefs), applying the well-settled rule that a discretion cannot be exercised outside the perpetuity period (*e.g., Re Coleman* [1936] Ch. 528; *Re Johnson's Settlement Trusts* [1943] Ch. 341). The learned judge refused to read the relevant clause as implying a duty to distribute within a reasonable time, less than twenty-one years, because the only ground for such implication was the effect of the Rule against Perpetuities. It is, again, well settled that documents must be construed without consideration of the effect of the rule on any of the possible constructions (*Re Legh's Settlement Trusts* [1938] Ch. 39 at p. 42). A further "salvage" argument, based on *Attenborough* v. *Attenborough* (1855) 1 K. & J. 296 and *Re De Sommery* [1912] 2 Ch. 622, was that the settlement created two trusts, one in the original trustees

(and so good as exerciseable only by living persons) and the other in their successors. This was likewise rejected, Wynn-Parry J. pointing out that the definition of trustees included the original trustees " and—not or—the trustees or trustee for the time being." The merit of the disjunctive " or " as opposed to the conjunctive " and " is reminiscent, in reverse, of the charity cases.

In this case the " objects of the trust " were defined as " such of the following individuals [drawn from a wide class previously enumerated] as shall from time to time during the appointed period be living." The decision shows that the settlement must have been construed as directing distribution at any time during the lives of beneficiaries born during the appointed period (or living at its commencement). The report does not disclose any argument that the above definition required distribution during the appointed period, but of course the draftsman could have easily made express provision if this had been intended.

Re Stirling (deceased) [1954] 1 W.L.R. 763; [1954] 2 All E.R. 113 (Ch.D.)

Will—gift to bank— no communication of secret trust—reference on face of will—absolute gift.—The consequences of an unsuccessful attempt to establish the existence of a secret trust depend on whether the existence of a trust is disclosed on the face of the will. If there is no reference to a trust the legatee takes beneficially; if there is, he holds for the residuary legatee or next-of-kin (*Re Boyes* (1884) 26 Ch.D. 531).

In the present case the testator steered a middle course. After appointing the Bank executor and trustee he bequeathed a legacy and a share of residue to it, expressing the wish that the property be disposed of according to any memorandum signed by him, but declaring expressly that no legal trust or obligation was to be created. No communication of wishes was made to the Bank by the testator, but a memorandum was found after his death. Wynn-Parry J., following *Re Falkiner* [1924] 1 Ch. 88, held that, as a matter of construction, the Bank took beneficially and did not hold for residuary legatees or next-of-kin.

The moral ought to be that testators relying upon secret trusts should not procrastinate. Yet, since the Bank in this case, and the solicitor-beneficiaries in *Re Falkiner, supra,* both expressed their intention of carrying out the wishes, the respective testators in fact circumvented both the Wills Act, 1837, and the limitations on secret trusts.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Hillier's Trusts [1954] 1 W.L.R. 700;
[1954] 2 All E.R. 59 (C.A.)

Charitable purpose—impracticability—cy-près doctrine.—In this case donations in various forms had been made in the course of a campaign for the erection of a voluntary hospital at Slough. Subsequent legislation prohibited the creation of any new voluntary hospital. Upjohn J. had drawn a distinction between donations earmarked for the erection of such a hospital and general donations to be used at the discretion of a charity committee. The Court of Appeal have reversed the learned judge on this point, holding that it is unreal to imagine that the donors who indicated a preference for a special object intended to recover their money if it proved unattainable in that form. *Cy-près* applications were to be made and a scheme prepared, which, the report suggests, will lead to the erection of a hospital at Slough as planned. The appeal court emphasised that most hospitals were voluntary when the campaign was organised and hence the reference to voluntary hospitals did not connote opposition to State hospitals. Donations were construed as donations to the general objective of the campaign, which could still substantially be realised. Evidence showed that no applications for return of their money had been received from any donors.

(Theobald 357.)

Re British School of Egyptian Archaeology [1954] 1 W.L.R. 546;
[1954] 1 All E.R. 887 (Ch.D.)

Charitable purpose—supervening impracticability—cy-près doctrine.—A Society was founded to excavate antiquities, hold exhibitions, publish learned studies, and train students in archaeology. A school had been formed and important excavations performed. As a result of the Second World War this work stopped. The Committee decided in 1950 that it was impossible for the School to carry on as originally planned. Assets were worth £4,000. A scheme was directed to use this fund to provide a scholarship in archaeology.

The most interesting point of the case lies in its re-assertion of the nature of an educational charity. Most works of research have a public element. Provided knowledge is disseminated, as well as discovered, the test of charity is satisfied. Hence gifts to advance excavations of historical or archaeological sites would seem to be charitable if our knowledge of history gains as a result. The important aspect of training was also present in this case. The choice of a scholarship was a safe one, as a clear example of a charitable object.

(Theobald 339, 358.)

Re Wright [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98 (C.A.)

Charitable purpose—practicable at date of vesting—never practicable in fact.—The Court of Appeal have affirmed the decision at first instance (noted *ante*, p. 190). It is not clear from the report whether it has yet been determined whether the charitable purpose was practicable in 1933 when the testatrix died and the gift "vested." The property was first left to a beneficiary for life. On the death of the life tenant it was proved that the purpose was no longer practicable. The court decided that this was immaterial, the gift did not lapse, and, presumably, a scheme will now be drawn up for *cy-près* application of the property.

It was already clear that a gift to a charitable institution could not lapse if the institution existed when the testatrix died. The important feature of the present case is that it applies the same rule to gifts for charitable purposes. It is easier to understand how a vested gift to a charitable body should not be divested because the body is wound up, but should be applied to similar objects. It is an extension of the principle, but a logical extension, to draw the same conclusion where the gift is for a purpose, to set up a non-existent convalescent home. There is much to be said for extending this principle to cases where a gift is made to a particular charity which ceases to exist before the death of testator, but it is probably too late to do so, though it is possible to make inroads on the rule, *e.g.*, by treating the gift as substantially a gift for a purpose which may still be achieved (and only secondarily to a specific charitable institution working in that field), or by preserving the identity of the charity in some new institution which has superseded it.

In *Re Slevin* [1891] 2 Ch. 236, there had been an orphanage in existence when the testator died. In *Re Soley* (1900) 17 T.L.R. 118, there had been a College referred to by him. In *Re Moon* [1948] 1 All E.R. 300, 303, the trust for mission work in Devonport was practicable in 1928 when the testator died but was not practicable when the life tenant died in 1944 and the funds became available, since the site had been blitzed and was to be used for an extension of the Navy Yard.

(Theobald 356.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Greaves, Greaves v. *Greaves* [1954] 1 W.L.R. 760; [1954] 2 All E.R. 109 (Ch.D.)

Inheritance (Family Provisions) Act, 1938, *and Intestates' Estates Act,* 1952—*Application out of time.*—The main point of this case is the difficulty which it raises for the practitioner. Roxburgh J. has held that the legislature must be deemed to have known that an estate would not be fully administered in six months, and, hence, that

applications for provision by dependants must not be held up until the net assets of the estate are known. If the party waits until he knows there are available assets he will find he is out of time, and he will not be given an extension merely on that account. It seems, however, that the party may run some risk if he proceeds prematurely. In a recent appeal to the Privy Council an application for provision was dismissed on the ground of lack of assets and leave to adduce fresh evidence was refused when it was found that assets existed. The remedy is presumably to take out the originating summons and adjourn it until the state of the estate is clarified. The master will not proceed until the net estate appears from the statement of assets and liabilities. As costs will come out of the estate the applicant ought not to suffer in any way if it transpires that the net assets are insufficient and no order can be made.

(Theobald 95.)

Re Sherman [1954] 2 W.L.R. 903; [1954] 1 All E.R. 893 (Ch.D.)

Specific devise—voidable—ademption.—In this case a freehold house was specifically devised by Rose Walters. It turned out that Rose Walters had been the executrix of the executor of one Ellen Sherman, the owner of the house. Rose Walters had one John Sibly buy the house at auction for her, offering the highest bid. Sibly then declared himself a trustee for her. The beneficiaries under the Sherman will applied to the court to set the purchase by Sibly aside. It was held that the devisee of the house was entitled to £400, the amount bid by Sibly, as the beneficiaries had to give credit for that sum. The beneficiaries under the Sherman will were treated as if they had an option to purchase the house for £400. But the effect of their claim was not to convert the house into personal property so as to adeem the devise to the devisee. Harman J. held that, in the case of a specific devise, the testatrix must have meant to pass to the devisee such interest in the house as she had. Had the will merely disposed of real and personal property without further specification the £400 would have been treated as personal property, under the doctrine of conversion.

(Theobald 245.)

Re Lybbe [1954] 1 W.L.R. 573; [1954] 1 All E.R. 487 (Ch.D.)

Will—construction—gift by incorporation—original and accrued shares.—The present case is not only complicated but very artificial. Gifts were made to Amy, Mabel and Helen for life, equally, expectant on the death of another beneficiary. As each one died, their share was to go to their children or issue who attained twenty-one. If there was no such person it accrued to the other two and their children on "similar" trusts. This was held to import a reference to issue, as well as children, in the last clause. Amy died unmarried in 1922.

Hence her third, or, more properly, a proportionate third, as her interest ceased on her death, accrued to Mabel and Helen. Mabel had a child who had five grandchildren and died. Mabel died in 1945, Helen died without issue in 1953. Roxburgh J. was constrained to hold that on Mabel's death her issue took her three-sixths, and in 1953 Helen's original two-sixths, but not the one-sixth representing the accrued share from Amy to Helen, as the gift over must be limited to one accruer. It is unfortunate that such a rule exists, but there is ample authority for it. The report of the instant case does not give the actual terms of the order, which would be valuable.

(Theobald 563.)

Harvell v. *Foster* [1954] 2 W.L.R. 642;
[1954] 1 All E.R. 851 (Q.B.D.)

Administrator functus officio becomes trustee—effect on sureties of bond.—When an administrator has fully administered the estate and realised the net estate, he becomes a trustee. If he then fails to account for the trust property the sureties of his administration bond are not liable. Otherwise their liability would be unduly prolonged.

(Williams on Executors 868.)

In the Estate of Cope [1954] 1 W.L.R. 608;
[1954] 1 All E.R. 698 (P.D.A.)

Grounds for removal of administrator.—If an administrator makes an improper probate valuation the beneficiary's remedy is to sue for an inventory and account under Administration of Estates Act, 1925, s. 25. It is not a ground for revocation of the grant of letters of administration. Incapacity, on such a ground, refers to physical or mental incapacity and not to maladministration.

(Williams on Executors 268, 466.)

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Bungalows (Maidenhead) Ltd. v. *Mason* [1954] 1 W.L.R. 769;
[1954] 1 All E.R. 1002

Rent Restrictions Acts — statutory tenant — rent book containing new terms—conversion of statutory into contractual tenancy.—Landlords and their managing agents would do well to make a note of this

case. The facts were simple, the essential point being that the landlord's rent collector and agent proffered a new rent book, containing different terms from those of the original contractual tenancy, to a statutory tenant, which were accepted by the latter. It was held that the statutory tenancy had been converted into a new contractual tenancy. This was unfortunate for the landlords, since it prevented them from relying on the rule (which would otherwise have applied) that the provisions of section 12 (1) (g) of the 1920 Act can operate once only to effect a transmission in relation to any tenancy. The moral for landlords is to see that nothing is done to convert statutory tenancies into contractual tenancies.

(Megarry, 7th ed., pp. 212, 220.)

O'Connor v. *Hume* [1954] 1 W.L.R. 824; [1954] 2 All E.R. 301

Rent Restrictions Acts—rent less than two-thirds of rateable value — premium — tenant's claim to protection — evidence in regard to written agreement.—In this case there was a tenancy agreement for the letting of a house for a year in consideration of a payment of £47 and a rent of 2s. per week (less than two-thirds of the rateable value) payable monthly. The agreement provided that if the tenant should desire to continue the tenancy thereafter it should be on the basis of a monthly tenancy at 2s. per week. On the face of it the tenancy was one to which the Rent Acts did not apply, but the tenant sought to claim their protection on various grounds, all of which were rejected. These grounds were all, in essence, attempts to persuade the court to admit evidence to contradict the terms of the written tenancy agreement. The importance of the decision lies in its clear recognition that, as Scott L.J. said in *Maclay* v. *Dixon* [1944] 1 All E.R. 22, 23, there is nothing to prevent parties from arranging a transaction in such a way as not to attract the control of the Acts, or, to put it positively, as to prevent the Acts from applying.

A tenancy at a rent of less than two-thirds of the rateable value plus a premium is outside the Acts. Doubts arise, however, in cases where the premium is payable not as a lump sum but by instalments over a period.

(Megarry, 7th ed., pp. 114, 373; Rent Restrictions Guide, 3rd ed., pp. 45, 63.)

Berkeley v. *Papadoyannis* [1954] 3 W.L.R. 23

Rent Restrictions Acts—subletting of part of premises—position where contractual tenancy is succeeded by a statutory tenancy—Crowhurst v. *Maidment distinguished.*—In this case a Court of Appeal of five judges was assembled in view of the fact that the tenant's counsel (R. E. Megarry) had intimated that he wished to argue that *Crowhurst* v. *Maidment* [1953] 1 Q.B. 23, had been decided *per incuriam* on the ground that it was in conflict with the House of Lords decision

in *Baker* v. *Turner* [1950] A.C. 401, which had not been cited to the court. *Crowhurst* v. *Maidment* was a Court of Appeal decision. In the event it appears that the five judges differed in their views on the correctness of the decision in *Crowhurst* v. *Maidment,* but they were agreed in the view that the present case was distinguishable. The correctness of *Crowhurst* v. *Maidment,* therefore, remains doubtful. The decision in that case was that if a statutory tenant sublets as separate dwellings those parts of the house which he has never occupied and does not intend to occupy, the landlord is entitled to an order for possession against him, although not against the subtenants. The distinction in the present case was that the tenant had at various times occupied parts of the sublet portions and might again do so in the future. The court said that the mere fact that a part of the premises has been sublet does not raise an implication that *Skinner* v. *Geary* [1931] 2 K.B. 456 is applicable to that part. " The tenant is fully entitled to suspend any decision as to whether, if any subtenant should go, he would or would not reoccupy the whole or any part of the premises sublet."

(Megarry, 7th ed., p. 184.)

Bushford v. *Falco* [1954] 1 W.L.R. 672; [1954] 1 All E.R. 957

Rent Restrictions Acts — shop and dwelling-house let together — dwelling-house in disrepair—abandonment of occupation of dwelling-house—loss of protection—The essential facts here were that a shop and dwelling-house were let together to the same tenant, there being no obligation on either landlord or tenant to repair. Owing to lack of repair the condition of the dwelling-house deteriorated to such an extent that the tenant ceased to live in it. He did not inform the landlord, and continued to carry on business in the shop. Later the landlord gave notice to quit the whole of the premises and claimed possession. The tenant relied on the protection of the Rent Acts. The county court judge held that the tenant was protected on the ground that his quitting of the dwelling-house was involuntary, due to its bad condition. The Court of Appeal reversed this decision. They pointed out that the fact that the tenant's departure was due to the condition of the premises was not by itself sufficient to entitle him to succeed. The tenant must show a continuing intention to resume occupation when the premises are rendered fit. The tenant here had not discharged the onus of proving an *animus revertendi,* even if there was sufficient indication of a *corpus possessionis.* Evershed M.R., however, warned landlords that this decision did not amount to an authoritative encouragement to achieve an escape from the Rent Acts by a policy of masterly inactivity in the matter of repairs. Normally a tenant who is forced to leave his home owing to lack of repairs should be able to prove without difficulty that his removal is unwelcome and temporary. He should take steps to inform his landlord of the position in no uncertain terms when he goes. The leading case on this subject is *Brown* v. *Brash* [1948] 2 K.B. 247.

(Megarry, 7th ed., p. 190; Rent Restrictions Guide, 3rd ed., p. 101.)

Knight v. *Olive* [1954] 2 W.L.R. 646; [1954] 1 All E.R. 701

Rent Restrictions Acts — position of subtenant — paddock sublet together with dwelling-house subject to Acts—house and paddock held under different titles — section 15 (3) *of* 1920 *Act — subtenant of paddock not protected.*—In this case the Court of Appeal, applying the principle of *Cow* v. *Casey* [1949] 1 K.B. 474, held that the tenant of a paddock with no dwelling-house on it could not bring it within the Acts to the detriment of his landlord, so as to confer protection on a subtenant, by the expedient of letting it along with a rent-restricted dwelling-house belonging to the tenant, with which the landlords of the paddock had nothing to do. The facts were that the tenant of a paddock sublet it to the person to whom he had let part of a dwelling-house which was his own property. So long as this arrangement subsisted the rooms in the dwelling-house and the paddock constituted a unit to which the Acts applied. Subsequently, however, the paddock and the dwelling-house were sold to different purchasers and the purchasers of the paddock gave the tenant notice to quit and claimed possession against both tenant and subtenant. The subtenant of the paddock contended that he was entitled to the protection of section 15 (3) of the 1920 Act so far as the paddock was concerned. (He had made good his claim to protection so far as the rooms in the dwelling-house were concerned.) The Court of Appeal had no difficulty in showing that, as compared with *Cow* v. *Casey*, this was an *a fortiori* case.

(Rent Restrictions Guide, 3rd ed., pp. 81, 97; Megarry, 7th ed., p. 408.)

Solomon v. *Orwell* [1954] 1 W.L.R. 629; [1954] 1 All E.R. 874

Rent Restrictions Acts—subtenancy granted by a statutory tenant —subtenancy subject to right to share living accommodation with statutory tenant—effect of giving up of possession by statutory tenant —position of subtenant.—This is an interesting case which delves into first principles. A statutory tenant sublet three rooms in a dwelling-house together with a right for the subtenant to share the use of the kitchen with the statutory tenant. The statutory tenant later gave up possession, and the landlord claimed possession against the subtenant. The landlord had not given the subtenant any notice to quit. It was held that the landlord was entitled to possession. The subtenant could claim no protection at common law, since the rule that the surrender of a tenancy does not destroy a subtenancy created out of it has no application to the surrender (or more correctly, relinquishment) of a statutory tenancy. A statutory tenant has no estate or interest in the land, and cannot confer such an estate or interest on his subtenant. The rule which protects subtenancies from destruction on the surrender of the tenancies out of which they are carved necessarily implies that the tenancy itself is a contractual one. The subtenant's only hope, therefore, was to rely on some specific statutory protection. This door also, however, was closed owing to the sharing arrangement.

A subtenant who shares a kitchen with the tenant is not protected by section 15 (3) of the 1920 Act, as was clearly established in *Shackleton* v. *Greenhalgh* [1951] 1 K.B. 725, and *Stanley* v. *Compton* [1951] 1 All E.R. 859.

This decision does not throw any doubt on the statutory tenant's power to create a subtenancy. Such a subtenancy may, if "lawful," attract the protection given by section 15 (3) if the other necessary conditions of that protection are present. In the present case the protection of section 15 (3) was excluded by the sharing arrangement. It should be noted that the argument turned on the position of the subtenant when the statutory tenancy came to an end.

(Megarry, 7th ed., pp. 403, 409, 411; Rent Restrictions Guide, 3rd ed., p. 106.)

Lambert v. *Ve-Ri-Best Manufacturing Co., Ltd.* [1954] 2 W.L.R. 782; [1954] 1 All E.R. 961

Landlord and Tenant Act, 1927—new lease for five years determinable in certain events on payment of compensation to be assessed in the future—jurisdiction to make order in these terms.—This case raised an interesting point in regard to the power to make an order for a new lease, in terms analogous to those provided for by section 5 (5) of the Landlord and Tenant Act, 1927, in a case to which section 5 (5) did not apply. Section 5 (5) only applies to leases granted for more than seven years, and provides that they must, if the landlord requires, be subject to a condition that, if at any time after the expiration of seven years from the commencement of the term the premises are required for a scheme of redevelopment the landlord may, on satisfying the tribunal and giving not less than twelve months' notice, resume possession on payment of such compensation as may be determined to be the value of the unexpired residue of the lease. In this case the county court judge ordered a new lease for five years, subject to a condition in regard to determination and compensation modelled on section 5 (5). The Court of Appeal held that he had jurisdiction to make the order under the general discretionary power given by section 5 (2), notwithstanding the fact that it meant the fixing of compensation at some future date, and notwithstanding the fact that the order adapted the provisions of section 5 (5) to a case where, owing to the shortness of the lease granted, section 5 (5) could not apply.

(Woodfall, 25th ed., p. 1186.)

Blackmore v. *Butler* [1954] 3 W.L.R. 62

Agricultural holdings—cottage occupied by farm labourer employed by tenant of farm—distinct tenancy of cottage—cottage an "agricultural holding."—The fact that a farm cottage may itself be an agricultural holding, and thus attract the formidable apparatus of the

Agricultural Holdings Act, 1948, may seem strange to some, but it is less strange when one realises that a single cowshed, with no land attached to it other than its site, could conceivably be an agricultural holding. In the present case the tenant of a farm took a farm cottage on a separate tenancy, and allowed one of his agricultural labourers to occupy it. The cottage was one which had always been used to house farm labourers; it was situated in the heart of farm land and the tenant of the farm had always intended to use it to house labour required to work the farm. The fact that it had been let as a separate tenancy from the farm was due to its having been occupied at the time the farm was let. The cottage was sold, and the purchaser served the tenant with a notice to quit. The tenant claimed the protection of the Agricultural Holdings Act on two alternative grounds:—(1) that the farm land and the cottage together constituted an agricultural holding, although not held under the same tenancy; (2) that the cottage itself constituted an agricultural holding. The first contention was rejected, on the ground that section 1 (1) of the 1948 Act contemplated a single contract of tenancy, but the second contention was upheld. The unreported case of *Godfrey* v. *Waite* (1951), of which a useful account is now given for the first time in the judgment of Somervell L.J. in the present case, was distinguished on the ground that there was no evidence that the house there was used for any other purpose than as a residence. Here, on a consideration of all the circumstances, the conclusion was that the cottage was used for agriculture for the purposes of a trade or business within the definition contained in section 1 (1) of the 1948 Act.

(Jackson's *Agricultural Holdings*, 10th ed., p. 107.)

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6. *REVENUE CASES*

By Desmond C. Miller, Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).

Income Tax

Commissioner of Taxation of the Commonwealth of Australia v. *Squatting Investment Co., Ltd.* [1954] 2 W.L.R. 186; [1954] 1 All E.R. 349; [1954] T.R. 37 (P.C.)

Statutory provisions: Section 25, the Income Tax Assessment Act, 1936–49; The Wool Realisation (Distribution of Profits) Act, 1948.

Point: A voluntary payment may be subjected to income tax in the hands of the recipient, the test being the capacity or character in which the payment is received. *Blakiston* v. *Cooper* [1909] A.C. 104.

Facts and Decision: The respondents, at all material times, carried on business in New South Wales and Queensland as Wool growers. During the war years, the wool was acquired by the Commonwealth of Australia from the respondents, pursuant to compulsory powers conferred by the National Security (Wool) Regulations 1939, the suppliers receiving the full amount, by way of compensation, to which they were legally entitled under these Regulations.

All wool acquired by the Commonwealth Government was sold to the United Kingdom Government, and it was a term of arrangement between the Governments that, should profit arise by reason of sales outside the United Kingdom (by the United Kingdom Government), that profit should be equally divided between the two Governments.

Pursuant to this arrangement, the Commonwealth Government received considerable sums of money, and decided to dispose of those sums in accordance with the terms of the Wool Realisation (Distribution of Profits) Act, 1948. Under this Act, growers who had supplied wool under the National Security (Wool) Regulations (*supra*) were to receive an amount arrived at by comparison between the quantity of wool supplied by the individual grower and the total of all participating wool supplied.

The respondents received the sum of £22,851 under the Act of 1948 during a period when they were carrying on in business as wool growers.

The Commissioner of Taxation contended that the sum so received was to be brought into account as a receipt of the respondents' business, the respondents on the other hand maintaining that, since it was conceded the payment was voluntary, it was to be viewed as a mere gift, and therefore not taxable.

Held: Although the payment was voluntary, it was made to the respondents not because of personal qualities, but because they had supplied participating wool in the course of their business as wool suppliers; it must, therefore, be treated as a trade receipt of an income character.

Broadstone Mills, Ltd. v. *Patrick* [1953] T.R. 441 (C.A.); *sub nom. Patrick* v. *Broadstone Mills* [1954] 1 W.L.R. 158; [1954] 1 All E.R. 163.

Statutory provisions: Case I of Schedule D, the Income Tax Act, 1918 (now section 123, the Income Tax Act, 1952).

Point: In computing profits for income tax purposes, the ordinary principles of commercial accounting are to be applied, and those principles require that the value of stock-in-trade, at the beginning and at the end of the period covered by account, should be entered in the Profit & Loss Account at cost or market value, whichever is the lower. *Whimster & Co.* v. *C. I. R.*, 12 T.C. 813 applied.

Re Moschi [1954] T.R. 59 (Ch.D.)

Statutory provisions: Sections 12 and 29, the Bankruptcy Act, 1914.

Point: The rule in bankruptcy, that, on a proof for a judgment debt, the court can go behind the judgment and ascertain whether there was a provable debt is necessary to prevent fraudulent proofs and fraudulent bankruptcies. These considerations do not apply to a proof for tax due under assessment. *Re Calvert* [1899] 2 Q.B. 145 applied.

Hamerton v. *Overy* [1954] T.R. 61 (Ch.D.)

Statutory provisions: Rule 6 of the Rules applicable to Cases I and II of Schedule D, and Rule 9 of Schedule E, the Income Tax Act, 1918; Paragraphs 2 and 4 of Part II of the Sixth Schedule, the Finance Act, 1949.

Point: (i) The following expenditure by a medical consultant employed as an anaesthetist by a Regional Hospital Board, namely:

Part-cost of telephone at his home;

Part-cost of maid employed at his home in answering telephone;

Subscription to Medical Defence Union;

was not wholly, exclusively and necessarily incurred in the performance of the duties of his employment, and, as a consequence, could not satisfy the tests laid down by Rule 9 (*supra*).

(ii) Since payments were made by the Regional Board to the appellant in respect of wear and tear to his car, he could not obtain initial or annual allowances in the absence of evidence that the payments by his employers related only to part of the wear and tear suffered by the vehicle, by reason of use in the employment.

Edwards v. *Bairstow and Harrison* [1954] T.R. 65 (Ch.D.)

Statutory provisions: Section 237 and Case I of Schedule D, the Income Tax Act, 1918.

Point: Whether a trade is or is not carried on is a question of fact upon which, assuming there is any evidence before them, the Commissioners' determination (in England) will be final. *Cooper* v. *Stubbs* [1925] 2 K.B. 753. *Leeming* v. *Jones* [1930] A.C. 415, applied.

(*Note*:—The Court of Session has held that the question of trade is one of mixed fact and law, and the importance of the present case is therefore that it is to be used as a method of obtaining a decision, upon this issue, from the House of Lords. The Court of Appeal recently affirmed the judgment of Mr. Justice Wynn-Parry in *Edwards* v. *Bairstow and Harrison*, and the question will be before the House of Lords during the current year.)

Camille and Henry Dreyfus Foundation Inc. v. *C. I. R.* [1954] T.R. 69 (Ch.D.)

Statutory provisions: Section 37, the Income Tax Act, 1918 (now section 447, the Income Tax Act, 1952).

Point: Section 37 (*supra*) does not afford exemption from tax to charitable bodies established outside the United Kingdom. *C. I. R.* v. *Gull*, 21 T.C. 374, applied.

Patrick v. *Burrows* [1954] T.R. 73 (Ch.D.)

Statutory provisions: Rule 1 of Schedule E, the Income Tax Act, 1918. (Now see the Ninth Schedule, the Income Tax Act, 1952).

Point: Where money or money's worth is received in virtue of an office or employment, it is assessable as a profit of that office or employment under Rule 1 of Schedule E (*supra*), and this will be so whether received from the employer or from some person other than the employer. *Calvert* v. *Wainwright* [1947] K.B. 526 applied.

Lewin v. *Aller* [1954] T.R. 83 (Ch.D.)

Statutory provisions: Section 17, the Income Tax Act, 1918 (now section 221, the Income Tax Act, 1952).

Point: No relief is to be given in respect of charges on income, and that is equally true whether or not the individual claiming relief is entitled to deduct income tax on payment of the charge.

Facts and decision: The charges on the taxpayer's income for the year 1950/51 were as follows:

	£
Mortgage and loan interest	85
Building society interest	56
Bank interest on overdraft	29
	£170

The taxpayer deducted tax on payment of the mortgage and loan interest, but the building society interest and bank interest were paid without deduction of tax.

The taxpayer maintained that as bank interest and building society interest were paid in full, he could not be said to be entitled to charge the tax in terms of section 221 (*supra*) against any other person, and it therefore followed that such interest was not to be deducted from his total income before computing the amount of earned income relief due to him.

Held: (Affirming the General Commissioners' determination) That all charges must be deducted in arriving at the amount of earned income available for earned income relief.

Adams v. *Musker*, 15 T.C. 413 followed.

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7. *MISCELLANEOUS CASES*

Addison v. *Brown* [1954] 1 W.L.R. 779; [1954] 2 All E.R. 213
Goodinson v. *Goodinson* [1954] 2 W.L.R. 1121; [1954] 2 All E.R. 255

Husband and wife—maintenance agreements—validity.—In the first of these two cases the wife sued on an agreement to pay her maintenance. The agreement provided that if divorce proceedings were taken in California, it was to be made an order of court; if the court made any other order, the agreement was to prevail. In fact the agreement was incorporated in the court order. The husband argued, on the footing of *Bennett* v. *Bennett* [1952] 1 K.B. 249, that the agreement was contrary to public policy and unenforceable. Streatfeild J. held that *Bennett* v. *Bennett* was confined to agreements seeking to oust the jurisdiction of the English courts and that the wife could sue. The distinction does not seem to be entirely happy. If the husband were domiciled in a foreign country and the wife resident here for three years, does the validity of the agreement or otherwise depend on where the divorce proceedings are instituted? Is an agreement to oust the jurisdiction of the Scottish courts quite valid in England? It seems clear, however, that the same result would have been arrived at in whatever way the matter had been approached.

In the second case there was an ordinary separation agreement whereby: (1) the husband undertook to pay weekly sums to the wife; (2) the wife was to indemnify the husband against debts incurred by her and not to pledge his credit; and (3) the wife was not to apply to the court for maintenance. Again it was argued that the agreement was invalid on the grounds that it was contrary to public policy and there was no consideration for the payments. The Court of Appeal held that, although the agreement not to apply to the court was unenforceable, this clause was severable. There was consideration, as the wife was to indemnify the husband against her debts and not to pledge his credit. The effect, therefore, was that, although the wife could have applied to the court for maintenance, the agreement would have been "the strongest possible evidence" of the proper amount of maintenance unless relevant circumstances had changed. She was therefore entitled to sue on the agreement.

Street v. *Denham* [1954] 1 W.L.R. 624;
[1954] 1 All E.R. 532 (Winchester Assizes)

Matrimonial home—deserted wife's right—purchaser with notice.—In this case we have the now familiar story of the husband deserting the wife leaving her in the matrimonial home and then selling the

house to a third party with notice of all the relevant facts. The only other material points were that the husband found and acquired other accommodation for the wife and that she had turned the husband's grandmother out of the house. Lynskey J. said that, had he not been bound by authority, he would have followed *Thompson* v. *Earthy* [1951] 2 K.B. 596 and given judgment for the plaintiff purchaser, but *Errington* v. *Errington* [1952] 1 K.B. 290 precluded this. The plaintiff did not try to get an order under the Married Women's Property Act, 1882, s. 17. In the queer post-war economics business losses and bank overdrafts have become assets and a matrimonial home has a tendency to become a liability unless the husband first mortgages it.

Solomons v. *Gertzenstein (R.) Ltd.* [1954] 2 W.L.R. 823; [1954] 1 All E.R. 1008 (Q.B.D.)

London Building Acts (Amendment) Act, 1939, ss. 33 and 133 (2) —meaning of "owner"—receiver included.—The London Building Acts (Amendment) Act, 1939, s. 133 (2) imposes an obligation on the owner of a building to keep and maintain in good condition and repair and in efficient working order all means of escape in case of fire provided in pursuance of the Act; and section 33 contains the familiar definition of "owner" as "the person for the time being receiving the rack-rent of the premises on his own account or as agent or trustee for any other person." The premises in question in the instant case were mortgaged by the owner to a building society who had appointed a receiver. By the Law of Property Act, 1925, s. 109 (2), a receiver is deemed to be the agent of the mortgagor. It was held that the receiver, as the person receiving the rack-rent, was the owner within the above definition and that he and the mortgagor were liable for breach of the obligation imposed by section 133 (2).

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Securities for Bankers' Advances. By J. Milnes Holden, LL.B., PH.D., A.I.B., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. xxx and 330 and (index) 12 pp. (25s. net.).

This book deals with guarantees and with mortgages both of realty and of every form of personalty, ranging from shares and life policies to growing crops and ships. Although it is intended for bank officials and candidates for banking examinations, it should also be useful, for quick reference, to solicitors who act for banks to any considerable extent. Its especial merit so far as solicitors are concerned is that it sets out fully the law peculiarly affecting banks as lenders, such as dates when searches should be made in the cases of mortgages to secure current accounts and as to priorities.

The author says that bank mortgages are drafted so as "to confer every possible advantage upon the banks and to deprive the customers (so far as it is legally possible to do so) of every conceivable benefit which would otherwise be secured to them at common law or by statute." With the same

objects in view, practical advice is given to bank managers as to their conduct in dealings with customers and guarantors, but some of the suggestions are perhaps open to criticism.

The preface is dated April 1, 1953, which accounts for the out-of-date information on page 30 as to fees charged by local authorities for answering inquiries. The statement on page 40 that every mortgage implies a personal obligation by the mortgagor and the unfortunately worded paragraphs on pages 34 and 35 about joint tenancies and tenancies in common are, to say the least, misleading.

J. H. G.

Knight's Annotated Model Byelaws. Eleventh Edition. Volume I, "Buildings." London: Charles Knight & Co., Ltd. 1953. vii and 196 pp. (42s.)

The present writer's views on the new Model Building Byelaws published by the Ministry of Housing and Local Government were outlined in the issue of this Journal for January, 1953, at p. 75. Readers of those notes will appreciate the need for a practical commentary on the new Model; this need is met by the present volume, although the legal implications of the "deemed to satisfy" clauses are not as fully discussed as they could have been.

Since the notes referred to above appeared, the Ministry have produced a fresh impression of their Model ("1953 Edition"), re-arranging some of the clauses, including a couple of new provisions and re-drafting (as a consequence mainly of improvements suggested by local authorities) some of the clauses in minor points of detail. The tenth edition of the present work covered the 1952 edition, and the new edition deals with the 1953 edition of the byelaws. There are, therefore, only slight differences between the tenth and the eleventh editions, and it is perhaps unfortunate that the risk of confusion has not been avoided by some device such as the use of a different colour of binding.

From a lawyer's point of view, the present work does not cover the subject widely enough; there is no discussion of the various sections of the Public Health Act, 1936, which have to be considered in connection with the preparation and submission of building byelaw plans, and the treatment of case law is scanty. From a technical point of view, however, the notes to each byelaw seem to be adequate, and there are full notes on the various British Standards and Codes of Practice which are so important to the subject-matter

Credit is not given to any author on the title page, but the publishers say they have had the assistance of Mr. R. A. Simons, who sat with the Ministry's Advisory Committee, in preparing the book. There is no table of statutes and, even more serious, there is no real index; that included is merely a reprint of the Ministry's index to the Model—a mere two pages of well spaced print.

J. F. G.

We have also received:—

The Modern Law Review. May, 1954. London: Stevens & Sons, Ltd. 96 pp. (6s.). Mr. J. D. B. Mitchell's article, "Learner's Licence," summarises the principal arguments for and against treating the deserted wife's licence to occupy the matrimonial home as an interest in land. Mr. Mitchell is against.

The Law in Action. London: Stevens & Sons, Ltd. 90 pp. (7s. 6d.). This little book contains a series of broadcast talks broadcast on the Third Programme revised to include case references. They read remarkably well.

CORRESPONDENCE

To the Editor,
The Conveyancer & Property Lawyer,

Dear Sir,

Key and Elphinstone

As one of the editors of the sections on Leases and Licences in the 15th edition of Key and Elphinstone's *Conveyancing Precedents,* perhaps I may be permitted to comment on some of the points made by your reviewer "S.M.T." with reference to those sections.

Key and Elphinstone is intended for *practitioners,* and for this reason preliminary notes have only been inserted where it would not have been possible to discuss the law in a footnote. The footnotes are for the guidance of the *draftsman* using the precedents. They are little longer altogether than in the 14th edition, several of the longer notes in that edition having been excised completely. I observe that in the review of Prideaux's *Conveyancing Precedents,* Volume 3, 24th edition (where the practice of using preliminary notes extensively in order to reduce the length of the footnotes is followed), contained in *The Conveyancer* (1953) Vol. 17, at p. 175, "G.B.G." roundly condemns the practice of inserting preliminary notes to sections.

Once it is accepted that the notes in *Key and Elphinstone* are intended as notes to the *precedents,* it follows that references to *Errington* v. *Errington* [1952] 1 K.B. 290 and the cases which have followed must be omitted, since there is no precedent of an occupational licence in the section on Licences. I would add that the omission of such a precedent is deliberate. The law on the subject of occupational licences is too uncertain for the insertion in a standard book of precedents of such a licence, prepared with the avowed object of evading the Rent Acts, to be justifiable. *Errington* v. *Errington* and associated cases were decided on their special facts, and Denning L.J. emphasised in that case (p. 298) that "parties cannot turn a tenancy into a licence merely by calling it one."

I am sorry that your reviewer cannot find the reference to *Borys* (*Micheal*) v. *Canadian Pacific Railway* [1953] A.C. 217. The case is referred to in the text in three places, and in the Table of Cases.

Yours faithfully,

V. G. H. Hallett.

Lincoln's Inn, May 6, 1954.

[We regret the error with regard to *Borys* (*Micheal*) v. *Canadian Pacific Railway.* As to the other points raised by Mr. Hallett, the doctrine of judicial precedent does not apply to reviews in this journal and even a reviewer is entitled to express, however timidly, his or her own views.—*Ed.*]

To the Editor,
The Conveyancer & Property Lawyer,

Dear Sir,

Acknowledgments for Production

Is it not high time that the question of acknowledgements for the production of documents of title was dealt with in a realistic way?

I am sure that practising solicitors will agree that an undue amount of time and trouble has to be given to this subject.

What would be the objection to an enactment that a person having a legal estate in land should have the right of production (and an undertaking for safe custody if he would have been entitled to require it) of all documents forming part of his title from all persons having possession of such documents as if the usual acknowledgment (and undertaking) had been given? I can see none.

Yours faithfully,

BERTRAM PLUMMER.

Leicester, May 11, 1954.

To the Editor,

The Conveyancer and Property Lawyer

Dear Sir,

Land Registry Practice—Building Estates

I have read, with interest, the Land Registry Practice Note referred to on page 70 of *The Conveyancer,* and I venture to enclose * for your consideration a form of transfer which I have for some time past been using in connection with building estate development.

It has always been a source of inconvenience that the ownership of fences has not been set out in the Land Certificate, and it was for that reason that a transfer in this form was brought into use in this office. The Land Registry's practice has always been to bind up the certified copy of the transfer in the Land Certificate.

In addition to depositing a plan with the Land Registry showing the plots on a building estate, I have found that, by depositing three copies of the plan with each of the District Councils and the County Councils, Local Land Charge searches can be made by reference to such plan, quoting the plot number, thereby dispensing with the necessity of lodging plans with each application for official Local Land Charge searches and the usual enquiries. This obviates in the case of large estates the cost and time of preparing plans in each instance.

Yours faithfully,

HEDLEY G. MORGAN.

Potters Bar, March 1, 1954.

* Printed *post,* p. 679.